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United States
Circuit Court of Appeals
For the Ninth Circuit.

THLINKET PACKING COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District
Court of the District of Alaska, Division No. 1.

Filed

AUG 20 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THLINKET PACKING COMPANY, a Corporation,
tion,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

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Court of the District of Alaska, Division No. 1.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

THLINKET PACKING COMPANY,
Defendant and Plaintiff in Error.

No. 1035-B.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

THLINKET PACKING COMPANY,
Defendant and Plaintiff in Error.

No. 1036-B.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

THLINKET PACKING COMPANY,
Defendant and Plaintiff in Error.

[Names and Addresses of Attorneys of Record.]

UNITED STATES DISTRICT ATTORNEY,
Attorney for Plaintiff and Defendant in Error,
Juneau, Alaska.

WINN & BURTON,
Attorneys for Defendant and Plaintiff in Error,
Juneau, Alaska.

[Indictment in Case No. 1034-B.]

*District Court for the District of Alaska, Division
Number One, Held at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Section 5, Act of June 26, 1906, entitled An Act for
the Protection and Regulation of the Fisheries
of Alaska.

At the Special August term of the District Court
of the United States of America, within and for the
District of Alaska, in the year of our Lord one
thousand nine hundred and fourteen, begun and held
at Juneau, in said District beginning August 17th,
A. D. 1914.

The Grand Jurors of the United States of Amer-
ica, selected, empaneled, sworn, and charged within
and for the District of Alaska, Division Number One
thereof, accuse the Thlinket Packing Company, a
corporation, by this indictment of the crime of un-
lawful fishing, committed as follows:

COUNT ONE.

The Grand Jurors aforesaid, upon their oaths
aforesaid, do present, that the said Thlinket Packing
Company, a corporation then and there organized
and existing as such, between the hours of six o'clock
post-meridian on Saturday, July 11, 1914, and six
o'clock ante-meridian on Monday, July 13, 1914, to

wit, on Sunday, July 12, 1914, in the waters of Icy Straits, near the mainland, abreast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of the said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 1," without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes. [1*]

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of statute in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 11th day of July, 1914, and six o'clock ante-meridian on Monday, the 13th day of July, 1914, to wit, on Sunday, July 12, 1914, in the waters of Icy Straits, near mainland, abreast of Porpoise Island, Excursion Inlet,

*Page-number appearing at foot of page of original certified Transcript of Record.

the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 2," without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [2]

COUNT THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 11th day of July, 1914, and six o'clock ante-meridian on Monday, the 13th day of July, to wit, on Sunday, July 12, 1914, in the waters of Icy Straits, near the mainland, southeast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrong-

fully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 3," without having twenty-five feet of webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [3]

COUNT FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 11th day of July, 1914, and six o'clock ante-meridian on Monday, the 13th day of July, 1914, to wit, on Sunday, July 12, 1914, in the waters of Icy Straits, near the mainland, southeast of Porpoise Island, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 4," without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such

trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jury duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [4]

COUNT FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 11th day of July, 1914, and six o'clock ante-meridian on Monday, the 13th day of July, 1914, to wit, on Sunday, July 12, 1914, in the waters of Icy Straits, mainland shore north of The Sisters, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 5," without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empan-

eled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [5]

COUNT SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation, then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 11th day of July, 1914, and six o'clock ante-meridian on Monday, the 13th day of July, 1914, to wit, on Sunday, July 12, 1914, in the waters of Icy Straits, off the mainland near Ansley Island, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 6," without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: that the Thlinket Packing Company, a corporation, did then and there commit the crime

of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

JNO. J. REAGAN,

United States Attorney. [6]

Presented by L. H. Keist, Foreman of the Grand Jury, in the presence of the Grand Jury, in open court, and filed in open court with the clerk of the District Court, all on this 1st day of September, 1914.

J. W. BELL,

Clerk of the District Court, Dist. of Alaska, Division
No. 1.

By J. T. Reed,
Deputy.

Witnesses:

ERNEST P. WALKER.

[Endorsed]: No. 1034-B. United States District Court, District of Alaska, First Division. The United States of America vs. Thlinket Packing Company, a Corporation. Indictment. Unlawful Fishing. Section 5, Act of June 26, 1906. A True Bill. L. H. Keist, Foreman. Filed this 1st day of September, A. D. 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy. [7]

*In the District Court for the District of Alaska,
Division Number One.*

No. 1034-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Summons [in Case No. 1034-B].

To Thlinket Packing Company, a Corporation, De-
fendant:

An indictment having been duly found and filed in the above-entitled court, at Juneau, on the first day of September, 1914, charging you, Thlinket Packing Corporation, with the crime of unlawful fishing, you, the said Thlinket Packing Company, a corporation, are hereby commanded to be and appear in the above-entitled court holden at Juneau, in said Division of said District, in the courtroom thereof, on the 14th day of September, 1914, and enter your plea to the said indictment.

And you, the United States Marshal of Division Number One of the District of Alaska, or any deputy, are hereby required forthwith to notify said Thlinket Packing Company, a corporation, of said indictment and to make service of this Summons upon the said defendant as required by law, and you will make due return hereof to the clerk of this court within fifteen days from the date of delivery to you, with an endorsement hereon of your doings in the premises.

IN WITNESS WHEREOF, I have hereto set my hand and caused to be affixed hereto the seal of the above Court this third day of September, 1914. [Seal of District Court for the District of Alaska, Div. No. 1.]

ROBERT W. JENNINGS,
Judge of Said Court. [8]

[Indictment in Case No. 1035-B.]

*District Court for the District of Alaska, Division
No. One, Held at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Section 5, Act of June 26, 1906, Entitled, An Act
for the Protection and Regulation of the Fish-
eries of Alaska.

At the special August term of the District Court of the United States of America, within and for the District of Alaska, in the year of our Lord one thousand nine hundred and fourteen, begun and held at Juneau, in said District beginning August 17th, A. D. 1914.

The Grand Jurors of the United States of America, selected, empaneled, sworn, and charged within and for the District of Alaska, Division Number One thereof, accuse the Thlinket Packing Company, a corporation, by this indictment of the crime of unlawful fishing, committed as follows:

COUNT ONE.

The Grand Jurors aforesaid, upon their oaths aforesaid, do present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, August 8, 1914, and six o'clock ante-meridian on Monday, August 10, 1914, to wit, Saturday, the 8th day of August 1914, in the waters of Chatham Straits, west shore Admiralty Island, north of Funter Bay, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of the said District of Alaska, and within the jurisdiction of this court, did unlawfully and wrongfully maintain and operate for fishing, a certain trap, known and designated as "T. P. Co. No. 11," without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes. [9]

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That the said Thlinket Packing Company, a corporation then and there

organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on Saturday, August 8, 1914, in the waters of Lynn Canal, west shore of Admiralty Island, south of Point Retreat, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 12," without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say; that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases [10] made and provided, and against the peace and dignity of the United States of America.

JNO. J. REAGAN,

United States Attorney. [11]

Presented by L. H. Keist, Foreman of the Grand Jury, in the presence of the Grand Jury, in open court and filed in open court with the clerk of the

District Court, all on this 1st day of September, 1914.

J. W. BELL,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

By J. T. Reed,
Deputy.

Witnesses:

ERNEST P. WALKER.

[Endorsed]: Copy. No. 1035-B. United States District Court, District of Alaska, First Division. The United States of America vs. Thlinket Packing Company, a Corporation. Indictment. Unlawful Fishing. Section 5, Act of June 26, 1906. A True Bill. L. H. Keist, Foreman. Filed this 1st day of September, A. D. 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy. [12]

*In the District Court for the District of Alaska,
Division Number One.*

No. 1035-B.

UNITED STATES OF AMERICA,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Summons [in Case No. 1035-B].

To Thlinket Packing Company, a Corporation, De-
fendant:

An indictment having been found and filed in the
above-entitled court, at Juneau, on the first day of

September, 1914, charging you, Thlinket Packing Company, a corporation, with the crime of unlawful fishing, you, the said Thlinket Packing Company, a corporation, are hereby commanded to be and appear in the above-entitled court holden at Juneau, in said Division of said District, in the courtroom thereof, on the 14th day of September, 1914, and enter your plea to the said indictment.

And you, the United States Marshal of Division Number One of the District of Alaska, or any deputy, are hereby required forthwith to notify said Thlinket Packing Company, a corporation, of said indictment and to make service of this Summons upon the said defendant as required by law, and you will make due return hereof to the clerk of this court within fifteen days from the date of delivery to you, with an endorsement hereon of your doings in the premises.

IN WITNESS WHEREOF, I have hereto set my hand and caused to be affixed hereto the seal of the above Court this third day of September, 1914.

[Seal of District Court for the District of Alaska,
Div. No. 1.]

ROBERT W. JENNINGS,
Judge of said Court. [13]

[Indictment in Case No. 1036-B.]

*District Court for the District of Alaska, Division
Number One, Held at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Section 5, Act of June 26, 1906, Entitled, An Act
for the Protection and Regulation of the Fish-
eries of Alaska.

At the Special August term of the District Court
of the United States of America, within and for the
District of Alaska, in the year of our Lord one
Thousand nine hundred and fourteen, begun and
held at Juneau, in said District beginning August
17th, A. D. 1914.

The Grand Jurors of the United States of
America, selected, empaneled, sworn, and charged
within and for the District of Alaska, Division
Number One thereof, accuse the Thlinket Packing
Company, a corporation, by this indictment of the
crime of unlawful fishing, committed as follows:

COUNT ONE.

The Grand Jurors aforesaid, upon their oaths
aforesaid, do present, that the said Thlinket Pack-
ing Company, a corporation then and there organ-
ized and existing as such, between the hours of six
o'clock post-meridian on Saturday, August 8, 1914,

and six o'clock ante-meridian on Monday, August 10, 1914, to wit, Sunday, the 9th day of August, 1914, in the waters Icy Straits, near the mainland, abreast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of the said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 1," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit of the free passage of salmon and other fishes.

[14]

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present; that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on

Sunday, August 9th, 1914, in the waters of Icy Straits, near mainland, abreast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 2," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [15]

COUNT THREE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on Sunday, August 9th, 1914 in the waters of Icy Straits, near mainland, south east of Porpoise Island, Excursion Inlet, the same being waters

of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 3," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [16]

COUNT FOUR.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on Sunday, August 9th, 1914, in the waters of Icy Straits near the mainland, southeast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and

within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 3A," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [17]

COUNT FIVE.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on Sunday, August 9, 1914, in the waters of Icy Straits, near the mainland, southeast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for

fishing a certain trap, known and designated as "T. P. Co. No. 4," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say: That the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [18]

COUNT SIX.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on Sunday, August 9, 1914, in the waters of Icy Straits, off the mainland, near Ansley Island, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 6," without having the tunnel of such trap closed and without having

twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America. [19]

COUNT SEVEN.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present, that the said Thlinket Packing Company, a corporation then and there organized and existing as such, between the hours of six o'clock post-meridian on Saturday, the 8th day of August, 1914, and six o'clock ante-meridian on Monday, the 10th day of August, 1914, to wit, on Sunday, August 9, 1914, in the waters of Icy Straits off Entrance Island, near Point Couverden, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated as "T. P. Co. No. 9," without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such

manner as to permit the free passage of salmon and other fishes.

And so the Grand Jurors duly selected, empaneled, sworn, and charged as aforesaid, upon their oaths do say, that the Thlinket Packing Company, a corporation, did then and there commit the crime of unlawful fishing, in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

JNO. J. REAGAN,
United States Attorney. [20]

[Endorsed]: Copy. No.1036-B. United States District Court, District of Alaska, First Division. The United States of America vs. Thlinket Packing Company, a Corporation. Indictment. Unlawful Fishing. Section 5, Act of June 26, 1906. A true bill. L. H. Keist, Foreman. Filed this 1st day of September, A. D. 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy.

Presented by L. H. Keist, Foreman of the Grand Jury, in the presence of the Grand Jury, in open Court and filed in open Court with the Clerk of the District Court, all on this 1st day of September, 1914.

J. W. BELL,
Clerk of District Court, Dist. of Alaska Division,
No. 1.

By J. T. Reed,
Deputy.

Witnesses:

ERNEST P. WALKER. [21]

*In the District Court for the District of Alaska,
Division Number One.*

No. 1036-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Summons [in Case No. 1036-B].

To Thlinket Packing Company, a Corporation, De-
fendant:

An indictment having been duly found and filed in the above-entitled court, at Juneau, on the first day of September, 1914, charging you, Thlinket Packing Company, a corporation, with the crime of unlawful fishing, you, the said Thlinket Packing Company, a corporation, are hereby commanded to be and appear in the above-entitled court holden at Juneau, in said Division of said District, in the courtroom thereof, on the 14th day of September, 1914, and enter your plea to the said indictment.

And you, the United States Marshall of Division Number One of the District of Alaska, or any deputy, are hereby required forthwith to notify said Thlinket Packing Company, a corporation, of said indictment and to make service of this Summons upon the said defendant as required by law, and you will make due return hereof to the clerk of this court within fifteen days from the date of delivery to you, with an endorsement hereon of your doings in the premises.

IN WITNESS WHEREOF, I have hereto set my hand and caused to be affixed hereto the seal of the above court this third day of September, 1914.

[Seal of District Court for the District of Alaska,
Div. No. 1.]

ROBERT W. JENNINGS,
Judge of said Court. [22]

[Demurrer to Indictment in Case No. 1034-A.]

*District Court for the District of Alaska, Division
Number One, Held at Juneau.*

No. 1034-A.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corporation.

Comes now the above-named defendant, Thlinket Packing Company, a corporation, by its attorneys, Winn and Burton, and demurs to the indictment on file in the above-entitled court in the above-entitled cause, and for cause of demurrer states as follows:

I.

That more than one crime is charged in said indictment against the defendant corporation.

II.

That said indictment does not state facts sufficient to constitute any crime against said defendant corporation.

III.

Without waiving any of the above and foregoing

grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn and Burton, specially demurs to count one of said indictment on the following grounds and for the following reasons:

a. That the facts stated in said count do not constitute a crime against said defendant company. The mere statement in said count that the said defendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap * * * * without having twenty-five feet of the webbing or net of the heart of said trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or charge any offense or crime against the said defendant.

b. That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes, and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section [23] 2147 of the said Compiled Laws of the Territory of Alaska in that the statement of facts in said count one, and the other part of the indictment referring to count one, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

IV.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn and

Burton, specially demurs to count two of said indictment on the following grounds and for the following reasons:

a. That the facts stated in said count do not constitute a crime against the said defendant company. The mere statement in said count that the said defendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap * * * * without having twenty-five feet of the webbing or net of the heart of said trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or charge any offense or crime against the said defendant.

b. That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of Section 2147 of the said Compiled Laws of the Territory of Alaska, in that the statement of facts in said count two, and the other part of the indictment referring to count two, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

V.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its [24] attorneys, Winn and Burton, specially demurs to count three of said indictment on the following grounds and for

the following reasons:

a. That the facts stated in said count do not constitute a crime against the said defendant company. The mere statement in said count that the said defendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap * * * * without having twenty-five feet of the webbing or net of the heart of said trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or charge any offense or crime against the said defendant.

b. That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes, and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws of the Territory of Alaska, in that the statement of facts in said count three, and the other part of the indictment referring to count three, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

VI.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn and Burton specially demurs to count four of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said

indictment against the defendant corporation.

b. That the facts stated in said count do not constitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the [25] tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws in that the statement of facts in said count four and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

VII.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count five of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not constitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws in that the statement of facts, in said count five and the other part of the indictment referring to said count, is not stated in such a [26] manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

VIII.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count six of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not constitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of said Compiled Laws in that the statement of facts in said count six is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

WINN & BURTON,
Attorneys for Defendant.

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1. United State of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Demurrer. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska, First Division, Sep. 15, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy. [27]

[Order Overruling Demurrer to Indictment, etc., in
Case No. 1034-B.]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

ORDER OVERRULING DEMURRER AND
PLEA OF "NOT GUILTY" ENTERED.

This cause comes on again regularly on this day for further hearing on the demurrer to the indictment filed herein; John R. Winn, Esquire, and M. G. Munley, Esquire, of counsel for defendant, appearing in support of said demurrer; United States Attorney John J. Reagan, appearing in opposition thereto.

After hearing argument of Mr. Munley, the Court overrules said demurrer, whereupon the defendant, through its counsel, enters a plea of "not guilty" to the indictment, and asks that the trial of this cause be set beyond October 15, 1914.

Done in open court this 21st day of September, 1914.

ROBERT W. JENNINGS,

Judge. [28]

[Demurrer to Indictment in Case No. 1035-B.]

*District Court for the District of Alaska, Division
No. One, Held at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Comes now the above-named defendant, Thlinket Packing Company, a corporation, by its attorneys, Winn & Burton, and demurs to the indictment on file in the above-entitled cause, and for cause of demurrer states as follows:

I.

That more than one crime is charged in said indictment against the defendant corporation.

II.

That said indictment does not state facts sufficient to constitute any crime as against said defendant corporation.

III.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count one of said indictment on the following grounds and for the following reasons:

a. That the facts stated in said count do not constitute a crime against the said defendant company. The mere statement in said count that the said de-

fendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap * * * without having twenty-five feet of the webbing or net of the heart of said trap on each side next to the part thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or [29] charge any offense or crime against the said defendant.

b. That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes, and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws of the Territory of Alaska, in that the statement of facts in said count one, and the other part of the indictment referring to count one, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

IV.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count two of said indictment on the following grounds and for the following reasons:

a. That the facts stated in said count do not constitute a crime against the said defendant company. The mere statement in said count that the said defendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap * * * *

without having twenty-five feet of the webbing or net of the heart of said trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or charge any offense or crime against the said defendant.

b. That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes, and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws of the Territory of Alaska in that the statement of facts in said count two, and [30] the other part of the indictment referring to count two, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

WINN & BURTON,
Attorneys for Defendant.

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Demurrer. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Sep. 15, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy. [31]

**[Order Overruling Demurrer to Indictment, etc., in
Case No. 1035-B.]**

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

**ORDER OVERRULING DEMURRER AND
PLEA OF "NOT GUILTY" ENTERED.**

This cause came on again regularly at this time for further hearing on the demurrer of defendant to the indictment filed herein: John R. Winn, Esquire, and M. G. Munley, Esquire, of counsel for defendant, appearing in support of said demurrer; United States Attorney John J. Reagan, appearing in opposition thereto. And after hearing argument of Mr. Munley, the Court overrules said demurrer.

Whereupon the defendant corporation, through its counsel, enters a plea of "not guilty" to the indictment, and asks that the trial of this cause be set beyond October 15, 1914.

Done in open court this 21st day of September, 1914.

ROBERT W. JENNINGS,
Judge. [32]

*District Court for the District of Alaska, Division
Number One, Held at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Demurrer [in Case No. 1036-B].

Comes now the above-named defendant, Thlinket Packing Company, a corporation, by its attorneys, Winn & Burton, and demurs to the indictment on file in the above-entitled court in the above-entitled cause, and for cause of demurrer states as follows:

I.

That more than one crime is charged in said indictment against the defendant corporation.

II.

That said indictment does not state facts sufficient to constitute any crime as against said defendant corporation.

III.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton specially demurs to count one of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not con-

stitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each [33] side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws in that the statement of facts in said count one and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

IV.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count two of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not con-

stitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel or such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the [34] Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws, in that the statement of facts in said count two and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

V.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count three of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not con-

stitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of said Compiled Laws, in that the statement of facts in said count three and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended [35] thereby or what crime, if any, is attempted or intended to be charged.

VI.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count four of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not con-

stitute or charge a crime against the said defendant company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws, in that the statement of facts in said count four and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

VII.

Without waiving any of the above and foregoing grounds for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to [36] count five of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not constitute or charge a crime against the said defendant

company in that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws, in that the statement of facts in said count five and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted or intended to be charged.

VIII.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count six of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not constitute or charge a crime against the said defendant

company in [37] that stating that said defendant did unlawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever.

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws, in that the statement of facts in said count six and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby or what crime, if any, is attempted to be charged.

IX.

Without waiving any of the above and foregoing grounds and causes for demurrer to the whole indictment, this defendant, by its attorneys, Winn & Burton, specially demurs to count seven of said indictment on the following grounds and for the following reasons:

a. That more than one crime is charged in said indictment against the defendant corporation.

b. That the facts stated in said count do not constitute or charge a crime against the said defendant company in that stating that said defendant did un-

lawfully and wrongfully maintain and operate for fishing the trap referred to therein without having the tunnel of such trap closed, and without having 25 feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, does not charge any crime whatsoever. [38]

c. That said charge in said count is duplicitous and ambiguous and attempts to charge three crimes and does not substantially conform with the requirements of chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of section 2147 of the said Compiled Laws, in that the statement of facts in said count seven and the other part of the indictment referring to said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby of what crime, if any, is attempted to be charged.

WINN & BURTON,
Attorneys for Defendant.

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1, United States of America, Plaintiff, vs. Thlinket Packing Company, a corporation, Defendant. Demurrer. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division, Sep. 15, 1914. J. W. Bell, Clerk. By J. T. Reed, Deputy. [39]

**[Order Overruling Demurrer to Indictment, etc., in
Case No. 1036-B.]**

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

**ORDER OVERRULING DEMURRER AND
PLEA OF "NOT GUILTY" ENTERED.**

This cause comes on again regularly at this time for further hearing on the demurrer of defendant to the indictment filed herein: John R. Winn, Esquire, and M. G. Munley, Esquire, of counsel for defendant, appearing in support of said demurrer; United States Attorney John J. Reagan, appearing in opposition thereto. And after argument by Mr. Munley, the Court overrules said demurrer.

Whereupon the defendant corporation, through its counsel, enters a plea of "not guilty" to the indictment, and asks that the trial of this cause be set beyond October 15, 1914.

Done in open court this 21st day of September, 1914.

ROBERT W. JENNINGS,

Judge. [40]

United States of America,
District of Alaska.

*In the District Court of the United States for the
District of Alaska, Division Number One.*

#1034-B.

THE UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Verdict [in Case No. 1034-B].

Special August Term, 1914.

We, the Jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the Indictment, with recommendation for clemency of the Court.

Dated Juneau, Alaska, October 30, 1914.

A. A. GABBS,

Foreman.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Oct. 30, 1914. J. W. Bell, Clerk. By John T. Reed, Deputy. [41]

United States of America,
District of Alaska.

*In the District Court of the United States for the
District of Alaska, Division Number One.*

#1035-B.

THE UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Verdict [in Case No. 1035-B].

Special August Term, 1914.

We, the Jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the Indictment, with recommendation for clemency of the Court.

Dated Juneau, Alaska, October 30, 1914.

A. A. GABBS,

Foreman.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Oct. 30, 1914. J. W. Bell, Clerk. By John T. Reed, Deputy. [42]

United States of America,
District of Alaska.

*In the District Court of the United States for the
District of Alaska, Division Number One.*

#1036-B.

THE UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Verdict [in Case No. 1036-B].

Special August Term, 1914.

We, the Jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the Indictment, with recommendation for clemency of the Court.

Dated Juneau, Alaska, October 30, 1914.

A. A. GABBS,

Foreman.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Oct. 30, 1914. J. W. Bell, Clerk. By John T. Reed, Deputy. [43]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

1035-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,
Defendant.

1036-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,
Defendant.

**Order [Denying Plaintiff's Motion to Set Aside
Verdict, etc.].**

This matter coming on for hearing in open court on motion of the defendant in each of the above-entitled cases, and plaintiff being represented by United States District Attorney for the District of Alaska, Division No. 1, and it appearing to the court that by oversight there has not been entered any order in either of the above-entitled cases overruling and denying plaintiff's motion in each of said cases, filed on the 28th day of January, A. D. 1915, asking to set aside the verdict in each of said cases or to consider said verdict in each of said cases as a verdict of acquittal, [44]

NOW, THEREFORE, IT IS HEREBY ORDERED that said motion be, and the same is, over-

ruled and denied, and this order is to be entered as of the 29th day of March, A. D. 1915.

Done in open court this 8th day of July, A. D. 1915.

ROBERT W. JENNINGS,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division, Jul. 8, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [45]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

**Oral Decision Denying Defendant's Motion for a
New Trial.**

The Court renders its oral decision, denying defendant's motion for a new trial.

Done in open court this 29th day of March, 1915.

ROBERT W. JENNINGS,
Judge.

No. 1035-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

**Oral Decision Denying Defendant's Motion for a
New Trial.**

The Court renders its oral decision, denying defendant's motion for a new trial.

Done in open court this 29th day of March, 1915.

ROBERT W. JENNINGS,
Judge.

No. 1036-B.

UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corporation.

**Oral Decision Denying Defendant's Motion for a
New Trial.**

The Court renders its oral decision, denying defendant's motion for a new trial.

Done in open court this 29th day of March, 1915.

ROBERT W. JENNINGS,
Judge. [46]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant.

Judgment and Sentence.

Comes now the defendant into court, through its counsel, John R. Winn, Esquire, for sentence upon the verdict of guilty, with recommendation for clemency of the Court, heretofore rendered herein, on October 30, 1914, for violation of section 5, Act of June 26, 1906; United States Attorney John J. Reagan also being present in court.

Whereupon the defendant, through its counsel, is asked if it has any reason to offer why the judgment and sentence of the Court should not now be imposed, and after hearing Judge Winn in respect thereto, and the Court being fully advised in the premises;

It is the judgment of the Court that the defendant herein is guilty of the violation of section 5, Act of June 26, 1906; and it is the sentence of the Court that said defendant, the Thlinket Packing Company, a corporation, pay a fine of One Hundred Dollars (\$100.00).

And on oral request of Judge Winn, and the United State Attorney not objecting thereto, the defendant is granted a stay of execution of forty (40) days from this date, in which to prepare a Bill of Exceptions and take an appeal, and execution upon the judgment is, in the meantime, stayed.

Done in open court this 31st day of March, 1915.

ROBERT W. JENNINGS,
District Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [47]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1035-B.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,
Defendant.

Judgment and Sentence.

Comes now the defendant into court, through its counsel, John R. Winn, Esquire, for sentence upon the verdict of guilty, with recommendation for clemency of the Court, heretofore rendered herein, on October 30, 1914, for violation of section 5, Act of June 26, 1906; United States Attorney John J. Reagan also being present in court.

Whereupon the defendant, through its counsel, is asked if it has any reason to offer why the judgment and sentence of the Court should not now be imposed, and after hearing Judge Winn in respect thereto, and the Court being fully advised in the premises;

It is the judgment of the Court that the defendant herein is guilty of the violation of section 5, Act of June 26, 1906; and it is the sentence of the Court that said defendant, the Thlinket Packing Company, a corporation, pay a fine of One Hundred Dollars (\$100.00).

And on oral request of Judge Winn, and the United States Attorney not objecting thereto, the de-

fendant is granted a stay of execution of forty (40) days from this date, in which to prepare a Bill of Exceptions and take an appeal, and execution upon the judgment is, in the meantime, stayed.

Done in open court this 31st day of March, 1915.

ROBERT W. JENNINGS,

District Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [48]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1036-B.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Judgment and Sentence.

Comes now the defendant into court, through its counsel, John R. Winn, Esquire, for sentence upon the verdict of guilty, with recommendation for clemency of the Court, heretofore rendered herein, on October 30, 1914, for violation of section 5, Act of June 26, 1906; United States Attorney John J. Reagan also being present in court.

Whereupon the defendant, through its counsel, is asked if it has any reason to offer why the judgment

and sentence of the Court should not now be imposed, and after hearing Judge Winn in respect thereto, and the Court being fully advised in the premises;

It is the judgment of the Court that the defendant herein is guilty of the violation of section 5, Act of June 26, 1906; and it is the sentence of the Court that said defendant, the Thlinket Packing Company, a corporation, pay a fine of One Hundred Dollars (\$100.00).

And on oral request of Judge Winn, and the United States Attorney not objecting thereto, the defendant is granted a stay of execution of forty (40) days from this date, in which to prepare a Bill of Exceptions and take an appeal, and execution upon the judgment is, in the meantime, stayed.

Done in open court this 31st day of March, 1915.

ROBERT W. JENNINGS,

Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Mar. 31, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [49]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

**Motion [for Order Making Exceptions, etc., Part of
Record on Appeal to Circuit Court of Appeals].**

Come now Winn & Burton, attorneys for the Thlinket Packing Company, the defendant in the above-entitled cases consolidated, and move the Court to make an order herein,

First. Making the objections, filed herein on the — day of Oct., 1914, made by the said defendant company through its attorneys, M. G. Munly and Winn & Burton, to any testimony or evidence being introduced, offered or received by this Court pertaining to any of the alleged charges in each and every of the indictments and in each and every count set forth in the same, a part of the record herein to be certified as such to the United States Circuit Court of Appeals for the 9th Circuit, under the Writ of

Error and proceedings had herein.

Second. To make a part of the record herein to be certified to the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error herein, the instructions tendered and offered to the Court by the defendant, and requested to be [50] given as the instructions in said case, which said instructions were filed in this case on October 29, 1914, and numbered one to five, inclusive.

Third. To make a part of the record herein under the Writ of Error and to be certified to the United States Circuit Court of Appeals for the Ninth Circuit, the motion filed herein on January 28, 1915, to set aside the verdict of the jury on the several indictments herein and to treat the verdict as a verdict of acquittal, and that the defendant be discharged.

Fourth. That the Court make a part of the record herein the Motion for New Trial filed in said consolidated cases on October 31, 1914, together with the affidavits of J. R. Homer, Wallis George, Z. M. Bradford, D. W. Fales and Charles H. Hall and A. A. Gabbs, attached to said motion and substantiating one of the grounds for new trial.

WINN & BURTON,

Attorneys for Defendant.

Copy of the foregoing motion received this 11th day of June, 1915, and service admitted.

JAMES A. SMISER,

U. S. Atty.,

By JNO. J. REAGAN,

Asst. U. S. Atty.,

Attys. for Plff.

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Motion. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court. District of Alaska. First Division, Jun. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [51]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the above-named defendant in the above-entitled case No. 1034-B, which said case was consolidated for trial with cases Nos. 1035-B and 1036-B, and assigns the following errors committed by the Court on the trial and determination of the said case No. 1034-B, and upon which said errors said defendant will rely upon its prosecution of the Writ of Error in said case and the errors that it will rely on in the Appellate Court:

First. That the Court erred in overruling defendant's demurrer in said case No. 1034-B, which order was made and entered in said case on the 21st

day of September, 1914, before the consolidation of said case for trial with the other two cases mentioned herein. Such ruling was excepted to by the defendant and exception allowed.

Second. The Court erred in not granting the defendant a separate trial in each of said cases mentioned herein, [52] and in making an order, over defendant's objections, consolidating and trying said three cases at one time, which said ruling of the Court was at the time excepted to and exception allowed.

Third. The Court erred in overruling the defendant's objections to the introduction of any testimony or evidence or receiving any evidence by the Court pertaining to any of the alleged charges made in said indictment, or any evidence or testimony which the plaintiff offered to establish defendant's guilt of any of the counts set forth in said indictment, which said objections were presented to and filed with the Court after the empaneling of the jury in said consolidated case and after the first witness on the part of the plaintiff was sworn to testify, which said objections are as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Objections.

Come now M. G. Munly and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit: Indictment Nos. 1034-B, 1035-B, 1036-B, and after the empaneling of the jury and the first witness on the part of the plaintiff, the United States, being sworn to testify concerning the alleged crime set forth in each and all of the counts set out in the foregoing indictments, and object to any testimony or evidence being introduced, offered or received by this Court pertaining to any of the alleged charges in each and every indictment, and in each and every count set forth in the same upon the following grounds and for the following reasons,

1. That each several indictment and every count thereof does not charge the offense defined and set out in the statute. That each several indictment, and every count thereof fails to charge that defendant did unlawfully fish for, take [53] or kill salmon of any species.

3. That each several indictment and every count thereof does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge which he is called upon to defend.

4. That each several indictment and every count thereof fails to allege that said alleged fishing was done during the weekly close season.

5. That each several indictment and every count

thereof does not allege or set out any particulars or facts as to the closing of the tunnels, or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to permit the free passage of salmon and other fishes, in such a way as to embrace every element of the offense defined by the statute.

6. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the districts or places excepted from the statute, viz.: that it was not in Cook's Inlet, the Delta of Copper River, Bering Sea, or waters tributary thereto; or that it was not with one of the excepted forms of gear, viz.: rod, spear or gaff.

7. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the Court to pronounce judgment in case of conviction according to the right of the case.

M. G. MUNLY and

WINN & BURTON,

Attorneys for Defendant.

Three and one-half. While the witness Earnest P. Walker was on the witness-stand in behalf of the plaintiff, the following questions were propounded him by the Government's attorney, which were objected to by the defendant.

Q. Mr. Walker, will you state where the traps are

situated that you have testified to here?

Mr. WINN.—We object to the question for the reason that it is incompetent, irrelevant and immaterial under the charges made in the indictments. That insomuch as they haven't set forth in these indictments that the traps are not in open waters or open fields where they can be fished at any and all times and all seasons, the question cannot be answered and no proof can be made thereof for the reason that it hasn't been properly pleaded in the indictments.

The COURT.—The objection will be overruled.

Q. (By Mr. REAGAN.) In what waters?

Mr. WINN.—We object.

The COURT.—Same ruling.

A. The waters of Icy Straits and Chatam Straits in that district.

To the introduction of such testimony an exception was allowed and the Court erred in admitting said evidence over defendant's objection.

Fourth. The Court erred in overruling and denying defendant's motion, filed at the close of plaintiff's case and when it rested its case, which said motion requested the Court to grant an instructed verdict in favor of the defendant, the Thlinket Packing Company, or to dismiss said case and grant a nonsuit therein for the lack or want of evidence to establish defendant's guilt of any of the charges set forth in the different counts or any one of the counts set forth in said indictment, which said motion was duly made, filed and presented to the Court, overruled and denied and an exception allowed to the defend-

ant. [54] The said motion so made and filed with the Court, as aforesaid, is as follows:

Come now M. G. Munly and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit: Indictments Nos. 1034-B, 1035-B and 1036-B, and attorneys for said company in all the counts in each and all of those indictments, and move the Court to direct the jury to bring in a verdict in favor of the Thlinket Packing Company, or to dismiss the proceedings for want of evidence to establish each and all of the counts, or any of the counts, set out in the three indictments above mentioned, upon the following grounds and for the following reasons: First, that each several indictment and every count therein does not charge the offense defined and set out in the statute; that each several indictment and every count thereof fails to charge that the defendant did unlawfully fish for, take, or kill salmon of any species.

Second. That there is no evidence to establish such fact in the case; that each and all of the several indictments, and each count thereof, did not allege that the defendant failed to close the gate, mouth or tunnel, or raise or lower the heart next to the pot in a trap that is designed and used by the defendant to fish for, take or kill salmon of any species, and that there is no evidence in the case to establish such fact.

Third. That each of the several indictments and every count therein does not set forth the facts con-

stituting the alleged offense in such manner as to apprise the defendant of the nature of the charge of which he is called upon to defend.

Fourth. That each several indictment, and every count thereof, fails to allege that the said alleged fishing was done during the closed season.

Fifth. That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to prevent the free passage of salmon in such a way as to embrace every element of the offense defined by the statute.

Sixth. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the district or place excepted from the statute, that is, it was not in Cook's Inlet, the Delta of the Copper River, Bering Sea, or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz.: rod, spear, or gaff, and that there is no evidence now before the jury to show as to whether or not, if any crime was committed, that it was committed within the prohibited districts of the waters of Alaska, as defined by the section under which the indictments are made.

Seventh. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of

certainly as to enable the Court to pronounce judgment in case of conviction according to the right of the case.

Eighth. That there is no evidence in the case on the part of the Government to disprove the fact or to show as to whether or not the way the respective traps were opened that there could or could not be a free passage of salmon and other fishes, counsel for the defendant company claiming that the reasonable construction of the statute is that if the trap was open in such a way so that it did not prevent the free passage of salmon and [55] other fishes, then the spirit of the statute is complied with; that the only thing the statute is intended to prohibit is the free running of salmon and other fishes, and that is an element which it is incumbent upon the Government to establish before it can establish any charge against the defendant company.

Fifth. The Court erred in failing and refusing to instruct the jury as requested by the defendant and to give to the said jury the instructions or any of them tendered and requested in said case by said defendant and its attorneys at the close of all the testimony and evidence on the part of plaintiff and defendant, which said refusal of the Court to so instruct the jury was duly excepted to by plaintiff and exception allowed. The said instructions so offered and requested by defendant and on file herein are as follows, to wit:

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Instructions.

INSTRUCTION NO. 1.

Gentlemen of the Jury, this is a criminal case consisting of three indictments against the defendant, and each indictment containing two or more counts or charges, each counter-charge claiming on the specific date mentioned therein that the defendant violated the fishing laws of Alaska by reason of maintaining and operating certain fish traps and failing to, in some instances or some of the counts, to raise or lower the web of that part of the trap known as the heart, as required by law, and in other counts charging this last matter and also the failure to close what is known as the tunnel leading from the heart of the trap to the pot, as required by law. It is necessary for the Government to prove these facts last mentioned beyond a reasonable doubt before you would be justified in finding the defendant guilty of any one or more of the counts contained in the three indictments referred to herein. And should the Government fail to prove to your mind beyond a reasonable doubt that the facts mentioned

herein are true, then it is your duty to acquit the defendant.

INSTRUCTION NO. 2.

I also instruct you, Gentlemen of the Jury, that the purpose and spirit of the law is to protect salmon so that they may not be obstructed in their passage to their spawning ground during the weekly close season. Unless the Government in this case prove to your mind beyond a reasonable doubt that the web of [56] the heart of any trap described in any of these various indictments or various counts was not raised, opened or lowered in such a manner as to permit the free passage of salmon or other fishes to escape and go to their spawning ground, then, it is your duty to return a verdict of "Not Guilty" herein.

INSTRUCTION NO. 3.

The statute provides that 25 feet of the webbing each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes during the weekly close season. As a matter of fact, if you find in any of the cases or charges against the defendant that 25 feet of the webbing of the heart was so lifted or lowered to permit the free passage of salmon or other fishes, your verdict must be for the defendant, and in this connection the statute does not mean that 25 feet of the heart of a trap must be raised or lowered vertically; if 25 feet of the webbing is lifted or lowered in a "V" shape but yet in such manner as to permit the free passage of salmon and other fishes such opening is a sufficient compliance with the stat-

ute and your verdict must be for the defendant.

INSTRUCTION NO. 4.

The language of the statute is that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. That does not mean 25 feet square or that 25 feet must be torn out of the sides of the heart every weekly close season. Any manner of lowering or lifting 25 feet of the heart so as to permit the free passage of salmon and other fishes so that they may go on through the trap to their spawning ground is sufficient. And if you find as to any of the charges in these indictments that the heart of any trap was so lifted or lowered or opened your verdict must be for the defendant.

INSTRUCTION NO. 5.

I also instruct you that the right of fishing, or of fishery as it is called, is common and free to every citizen. The Government has, however, the power to regulate and restrict it. This right to free fishing can only be limited or taken away just as far as any such regulations go; and, therefore, the regulations regarding salmon traps during the weekly close season established by the Government cannot be extended or expanded beyond their strict meaning. The statute says that:

“Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the ‘heart’ of such traps on each side of the ‘pot’

shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.”

Unless the language of the statute itself provided that twenty-five feet of the heart on each side next to the pot should be lifted or lowered from the top to the bottom of the heart, it would be adding to the statute to say so.

You must consider the law as it is. You must determine from the evidence whether 25 feet of the web of the heart on each side of the pot was lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If you find that it was so lowered or lifted in any of the charges against this defendant alleged in the various indictments, you must acquit the defendant. [57]

Sixth. The Court erred in giving to the jury the following instructions:

“Now, that is a positive demand, gentlemen, that twenty-five feet of that net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that that twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide that window-pane in two parts. Suppose that window-pane were actually in two separate parts, so each part could be lowered or raised and each part was

twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating.) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way,—I am asking you to raise or lower it. Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of twenty-five feet.”

To all of which said instruction defendant duly excepted at the time that same was given and an exception was allowed.

Seventh. The Court erred in receiving and filing the verdict of the jury in this case over defendant's objection made thereto, which said objection to the reception and filing of said verdict was made and based upon the statements made by Mr. Gabbs, the foreman of the jury, at the time the jury came into court to deliver its verdict, which said statements are more particularly set out in the record herein, and by the affidavit of Mr. Gabbs, foreman of the petit jury and other jurors. Said affidavits are set forth in assignment of error Number IX.

Eighth. The Court erred in overruling defend-

ant's motion filed herein on the 18th day of January, 1915, which is as follows:

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Motion.

Comes now the defendant in the above-entitled cause by its attorneys, M. G. Munly and Winn & Burton, and moves the Court [58] that the verdict of the jury to the indictments in the above-entitled cause be set aside or considered and treated as a verdict of acquittal, and that the defendant be discharged upon the following grounds and for the following reasons, to wit: *viz.*:

I.

Because the true verdict of the jury, as expressed by the jurors through their foreman in open court at the close of the trial of the above-entitled cause and after they had retired to the jury-room and deliberated upon their verdict and at the time of bringing in their verdict into court, was to the effect that defendant had not violated the spirit of the law under which the aforesaid indictments were returned against the above-named defendant.

II.

Because the verdict of the jury to the effect that the defendant had not violated the spirit of the law

is the equivalent of a general verdict of "not guilty."

III.

Because such a verdict does not affirmatively find the defendant guilty of all the elements of the crime charged in the indictments.

IV.

Because sentence cannot be passed upon a defendant based upon a verdict other than that of guilty, and the true verdict of the jury in this case was to the effect that the defendant was not guilty of a violation of the spirit of the law.

V.

Because any judgment which might be rendered in the above-entitled cause based upon a verdict of guilty would be founded upon a verdict which does not specifically find the defendant guilty of all the elements constituting the offense or offenses charged in the indictment and such judgment would be null and void.

VI.

Because said verdict is not responsive to the issues.

M. G. MUNLY,
WINN & BURTON,
Attorneys for Defendant.

Ninth. The Court erred in overruling and denying defendant's motion for a new trial herein, which said motion with the affidavits in support thereof are as follows: [59]

Nos. 1034-B, 1035-B, 1036-B—Consolidated.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Motion for New Trial.

Comes now the above-named defendant, by its attorneys, M. G. Munly and Winn & Burton, in each of the above-entitled numbered causes consolidated, and feeling itself aggrieved herein, moves the Court to set aside each and all of the verdicts rendered in said causes No. 1034-B, 1035-B and 1036-B against the said defendant in each of said causes and filed in this court on the 30th day of October, A. D. 1914, for the following reasons and following causes materially affecting the substantial right of said defendant.

First. Irregularity in the proceedings of the Court and jury and order and orders of the Court made at the time and upon the reception of the verdict herein, and abuse of discretion of the Court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the Court and jury, and rulings and orders of the Court so made, showing such abuse of discretion will more particularly appear by the affidavits of A. A. Gabbs, Z. M. Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George,

jurors, hereto attached, and the stenographic report of the rulings, orders and actions of the Court at the time and upon receiving and filing the verdicts herein.

Second. Insufficiency of the evidence to justify the aforesaid verdicts and each and all of them rendered in the above-entitled causes consolidated, and said verdicts and each and all of them are against law.

Third. Error in law occurring at the trial and excepted to by the defendants.

M. G. MUNLY,
WINN & BURTON,
Attorneys for Defendant.

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,
Defendant.

Affidavit.

United States of America,
Territory of Alaska,—ss.

J. R. Homer, Wallis George, Z. M. Bradford, D. W. Fales and Charles H. Hall, each for himself being first duly sworn on oath, deposes and says: that I was one of the members of the trial jury in the above case. Upon entering the courtroom to report on our verdict, after the jury had responded to [60]

the roll-call, the question was asked by the Judge as to whether the jury had agreed on the verdict, and the foreman, A. A. Gabbs, declared that we had, and asked the judge in open court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The Judge asked as to what recommendation or qualifications we wanted, and the foreman thereupon made the statement that, while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement," or words to that effect, and then, speaking towards the jury, Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon, in the open court, the foreman wrote in each verdict a recommendation for clemency of the Court, and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer, and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to said foreman of the jury, said "Now you may make the statement you did on bringing in your verdict," or words to that effect, and the foreman repeated substantially his original

statement to the Court.

J. R. HOMER.

WALLIS GEORGE.

Z. M. BRADFORD.

D. W. FALES.

CHARLES H. HALL.

Subscribed and sworn to before me this 31st day
of October, A. D. 1914.

NEWARK L. BURTON,

Notary Public for Alaska.

My commission expires November 8, 1917.

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Affidavit.

United States of America,
Territory of Alaska,—ss.

A. A. Gabbs, being first duly sworn, on oath deposes and says: That I acted as foreman of the trial jury in the above cases. Upon entering the courtroom to report on our verdict after the jury had responded to the roll-call, the question was asked by the Judge as to whether the jury had agreed on the verdict and I as foreman declared that we had and asked the judge in the open court as to whether it

were possible for us to make any [61] recommendations qualifying or amending the verdict. The Judge asked as to what recommendations or qualifications we wanted, and I thereupon made the statement that while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer, as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement" or words to that effect, and then, speaking toward the jury Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon in the open court I wrote in each verdict a recommendation for clemency of the Court and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to me as foreman of the jury, said, "Now, you may make the statement you did on bringing in your verdict," or words to that effect, and I thereupon repeated substantially my original statement to the Court.

A. A. GABBS.

Subscribed and sworn to before me this 31st day of October, A. D. 1914.

NEWARK L. BURTON,
Notary Public for Alaska.

My commission expires November 8, 1917.

Tenth: The Court erred in sentencing the said defendant to pay a fine herein in the sum of \$100, and entering and filing the judgment herein against said defendant for said amount, which said judgment was entered and filed in this case on the 31 day of March, 1915.

M. G. MUNLY and
WINN & BURTON,
Attorneys for Defendant.

Copy of the foregoing Assignment of Error received this —— day of June, A. D. 1915, and service admitted.

JAMES A. SMISER,
United States District Attorney for the District of
Alaska, Division Number One,

Atty. for Plff.

By JNO. J. REAGAN,
Asst. U. S. Atty.

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1, United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Assignment of Error. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [62]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the above-named defendant in the above-entitled case No. 1035-B, which said case is consolidated for trial with cases Nos. 1034-B and 1036-B, and assigns the following errors committed by the Court on the trial and determination of the said case No. 1035-B, and upon which said errors said defendant will rely upon its prosecution of the Writ of Error in said case and the errors that it will rely on in the Appellate Court:

First. That the Court erred in overruling defendant's demurrer in said case No. 1035-B, which said order was made and entered in said case on the 21st day of September, 1914, before the consolidation of said case for trial with the other two cases mentioned herein. Such ruling was excepted to by the defendant and exception allowed.

Second. The Court erred in not granting the defendant a separate trial in each of said cases mentioned herein, [63] and in making an order, over defendant's objections, consolidating and trying said

three cases at one time, which said ruling of the Court was at the time excepted to and exception allowed.

Third. The Court erred in overruling the defendant's objections to the introduction of any testimony or evidence or receiving any evidence by the Court pertaining to any of the alleged charges made in said indictment, or any evidence or testimony which the plaintiff offered to establish defendant's guilt of any of the counts set forth in said indictment, which said objections were presented to and filed with the court after the empaneling of the jury in said consolidated case and after the first witness on the part of the plaintiff was sworn to testify, which said objections are as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant.

Objections.

Come now M. G. Munly and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit: Indictment Nos. 1034-B, 1035-B, 1036-B, and after

the empaneling of the jury and the first witness on the part of the plaintiff, the United States, being sworn to testify concerning the alleged crime set forth in each and all of the counts set out in the foregoing indictments, and object to any testimony or evidence being introduced, offered or received by this Court pertaining to any of the alleged charges in each and every indictment, and in each and every count set forth in the same upon the following grounds and for the following reasons:

1. That each several indictment and every count thereof does not charge the offense defined and set out in the statute. That each several indictment, and every count thereof fails to charge that defendant did unlawfully fish for, take [64] or kill salmon of any species.

3. That each several indictment and every count thereof does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge which he is called upon to defend.

4. That each several indictment and every count thereof fails to allege that said alleged fishing was done during the weekly close season.

5. That each several indictment, and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels, or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to permit the free passage of salmon and other fishes, in such a way as to embrace every element of the offense defined by the statute.

6. That each several indictment, and every count thereof fails to allege that the locality where such fishing was done was not in the districts or places excepted from the statute, viz.: that it was not in Cook's Inlet, the Delta of Copper River, Bering Sea, or waters tributary thereto; or that it was not with one of the excepted forms of gear, viz.: rod, spear or gaff.

7. That each several indictment, and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the Court to pronounce judgment in case of conviction according to the right of the case.

M. G. MUNLY and
WINN & BURTON,
Attorneys for Defendant.

Three and One Half. While the witness Earnest P. Walker was on the witness-stand in behalf of the plaintiff the following questions were propounded him by the government's attorney, which were objected to by the defendant.

Q. Mr. Walker will you state where the traps are situated that you have testified to here?

Mr. WINN.—We object to the question for the reason that it is incompetent, irrelevant and immaterial under the charges made in the indictments. That inasmuch as they haven't set forth in these indictments that the traps are not in open waters or open fields where they can be fished at any and all

times and all seasons, the question cannot be answered and no proof can be made thereof for the reason that it hasn't been properly pleaded in the indictments.

The COURT.—The objection will be overruled.

Q. (By Mr. REAGAN.) In what waters?

Mr. WINN.—We object.

The COURT.—Same ruling.

A. The waters of Icy Straits and Chatam Straits in that district.

To the introduction of such testimony an exception was allowed and the Court erred in admitting said evidence over defendant's objection.

Fourth. The Court erred in overruling and denying defendant's motion, filed at the close of plaintiff's case and when it rested its case, which said motion requested the court to grant an instructed verdict in favor of the defendant, the Thlinket Packing Company, or to dismiss said case and grant a nonsuit therein for the lack or want of evidence to establish defendant's guilt of any of the charges set forth in the different counts or any one of the counts set forth in said indictment, which said motion was duly made, filed and presented to the Court, overruled and denied and an exception allowed to the defendant. [65]

The said motion so made and filed with the Court, as aforesaid, is as follows:

Come now M. C. Munly and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit:

Indictments Nos. 1034-B, 1035-B, and 1036-B, and attorneys for said company in all the counts in each and all of those indictments, and move the Court to direct the jury to bring in a verdict in favor of the Thlinket Packing Company, or to dismiss the proceedings for want of evidence to establish each and all of the counts, or any of the counts, set out in the three indictments above mentioned, upon the following grounds and for the following reasons:

First, That each several indictment and every count therein does not charge the offense defined and set out in the statute; that each several indictment and every count thereof fails to charge that the defendant did unlawfully fish for, take, or kill salmon of any species.

Second. That there is no evidence to establish such fact in the case; that each and all of the several indictments, and each count thereof, did not allege that the defendant failed to close the gate, mouth or tunnel, or raise or lower the heart next to the pot in a trap that is designed and used by the defendant to fish for, take or kill salmon of any species, and that there is no evidence in the case to establish such fact.

Third. That each of the several indictments and every count therein does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge of which he is called upon to defend.

Fourth. That each several indictment, and every count thereof, fails to allege that the said alleged fishing was done during the closed season.

Fifth. That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to prevent the free passage of salmon in such a way as to embrace every element of the offense defined by the statute.

Sixth. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the district or place excepted from the statute; that is, it was not in Cook's Inlet, the Delta of the Copper River, Bering Sea, or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz.: rod, spear, or gaff, and that there is no evidence now before the jury to show as to whether or not, if any crime was committed, that it was committed within the prohibited districts of the waters of Alaska as defined by the section upon which the indictments are made.

Seventh. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such a manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the Court to pronounce judgment in case of conviction according to the right of the case.

Eighth. That there is no evidence in the case on the part of the Government to disprove the fact or to show as to whether or not the way the respective

traps were opened that there could or could not be a free passage of salmon and other fishes, counsel for the defendant company claiming that the reasonable construction of the statute is that if the trap was open in such a way so that it did not prevent the free passage of salmon and [66] other fishes, then the spirit of the statute is complied with; that the only thing the statute is intended to prohibit is the free running of salmon and other fishes, and that is an element which it is incumbent upon the Government to establish before it can establish any charge against the defendant company.

FIFTH. The Court erred in failing and refusing to instruct the jury as requested by the defendant and to give to the said jury the instructions or any of them tendered and requested in said case by said defendant and its attorneys at the close of all the testimony and evidence on the part of plaintiff and defendant, which said refusal of the Court to so instruct the jury was duly excepted to by plaintiff and exception allowed. The said instructions so offered and requested by defendant and on file herein are as follows, to wit:

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Instructions.**INSTRUCTION No. 1.**

Gentlemen of the Jury, this is a criminal case consisting of three indictments against the defendant, and each indictment containing two or more counts or charges, each counter-charge claiming on the specific date mentioned therein that the defendant violated the fishing laws of Alaska by reason of maintaining and operating certain fish-traps and failing to, in some instances or some of the counts, to raise or lower the web of that part of the trap known as the heart, as required by law, and in other counts charging this last matter and also the failure to close what is known as the tunnel leading from the heart of the trap to the pot, as required by law. It is necessary for the Government to prove these facts last mentioned beyond a reasonable doubt before you would be justified in finding the defendant guilty of any one or more of the count's contained in the three indictments referred to herein. And should the Government fail to prove to your mind beyond a reasonable doubt that the facts mentioned herein are true, then, it is your duty to acquit the defendant.

INSTRUCTION No. 2.

I also instruct you, Gentlemen of the Jury, that the purpose and spirit of the law is to protect salmon so that they may not be obstructed in their passage to their spawning ground during the weekly close season. Unless the Government in this case prove to your mind beyond a reasonable doubt that the web

of [67] the heart of any trap described in any of these various indictments or various counts was not raised, opened or lowered in such a manner as to permit the free passage of salmon or other fishes to escape and go to their spawning ground, then, it is your duty to return a verdict of "Not Guilty" herein.

INSTRUCTION No. 3.

The statute provides that 25 feet of the webbing each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes during the weekly close season. As a matter of fact if you find in any of the cases or charges against the defendant, that 25 feet of the webbing of the heart was so lifted or lowered to permit the free passage of salmon or other fishes, your verdict must be for the defendant, and, in this connection the statute does not mean that 25 feet of the heart of a trap must be raised or lowered vertically; if 25 feet of the webbing is lifted or lowered in a "V" shape but yet in such manner as to permit the free passage of salmon and other fishes such opening is a sufficient compliance with the statute and your verdict must be for the defendant.

INSTRUCTION No. 4.

The language of the statute is, that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. That does not mean 25 feet square or that 25 feet must be torn out of the sides of the heart every

weekly close season. Any manner of lowering or lifting 25 feet of the heart so as to permit the free passage of salmon and other fishes so that they may go on through the trap to their spawning ground is sufficient. And if you find as to any of the charges in these indictments that the heart of any trap was so lifted or lowered or opened, your verdict must be for the defendant.

INSTRUCTION No. 5.

I also instruct you that the right of fishing, or of fishery as it is called, is common and free to every citizen. The Government has, however, the power to regulate and restrict it. This right to free fishing can only be limited or taken away just as far as any such regulations go; and, therefore, the regulations regarding salmon traps during the weekly close season established by the Government cannot be extended or expanded beyond their strict meaning. The statute says that:

“Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the “heart” of such traps on each side of the “pot” shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.”

Unless the language of the statute itself provided that twenty-five feet of the heart on each side next to the pot should be lifted or lowered from the top to the bottom of the heart, it would be adding to the statute to say so.

You must consider the law as it is. You must determine from the evidence whether 25 feet of the web of the heart on each side of the pot was lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If you find that it was so lowered or lifted in any of the charges against this defendant alleged in the various indictments, you must acquit the defendant. [68]

Sixth. The Court erred in giving to the jury the following instruction:

“Now, that is a positive demand, gentlemen, that twenty-five feet of that net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that that twenty-five feet shall be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide that window-pane in two parts. Suppose that window-pane were actually in two separate parts, so each could be lowered or raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating.) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way,—I am asking you to raise or lower it.

Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of twenty-five feet.”

To all of which said instruction defendant duly excepted at the time that same was given and an exception was allowed.

Seventh. The Court erred in receiving and filing the verdict of the jury in this case over defendant's objection made thereto, which said objection to the reception and filing of said verdict was made and based upon the statements made by Mr. Gabbs, the foreman of the jury, at the time the jury came into court to deliver its verdict, which said statements are more particularly set out in the record herein, and by the affidavit of Mr. Gabbs, foreman of the petit jury, and other jurors. Said affidavits are set forth in Assignment of Error Number IX.

Eighth. The Court erred in overruling defendant's motion filed herein on the 18th day of January, 1915, which is as follows:

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant.

Motion.

Comes now, the defendant in the above-entitled cause by its attorneys M. G. Munly and Winn & Burton, and moves the Court [69] that the verdict of the jury to the indictments in the above-entitled cause be set aside or considered and treated as a verdict of acquittal, and that the defendant be discharged upon the following grounds and for the following reasons, to wit, viz.:

I.

Because the true verdict of the jury as expressed by the jurors through their foreman in open court at the close of the trial of the above-entitled cause and after they had retired to the jury-room and deliberated upon their verdict and at the time of bringing in their verdict into court, was in the effect that defendant had not violated the spirit of the law under which the aforesaid indictments were returned against the above-named defendant.

II.

Because the verdict of the jury to the effect that the defendant had not violated the spirit of the law is the equivalent of a general verdict of "not guilty."

III.

Because such a verdict does not affirmatively find the defendant guilty of all the elements of the crime charged in the indictments.

IV.

Because sentence cannot be passed upon a defendant based upon a verdict other than that of guilty, and the true verdict of the jury in this case was to the

effect that the defendant was not guilty of a violation of the spirit of the law.

V.

Because any judgment which might be rendered in the above-entitled cause based upon a verdict of guilty would be founded upon a verdict which does not specifically find the defendant guilty of all the elements constituting the offense or offenses charged in the indictment and such judgment would be null and void.

VI.

Because said verdict is not responsive to the issues.

M. G. MUNLY,

WINN & BURTON,

Attorneys for Defendant.

Ninth. The Court erred in overruling and denying defendant's motion for a new trial herein, which said motion with the affidavits in support thereof are as follows: [70]

Nos. 1034-B, 1035-B, 1036-B—Consolidated.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant.

Motion for New Trial.

Comes now the above-named defendant, by its attorneys, M. G. Munly and Winn & Burton, in each of the above-entitled numbered causes consolidated, and feeling itself aggrieved herein, moves the Court

to set aside each and all of the verdicts rendered in said causes No. 1034-B, 1035-B and 1036-B against the said defendant in each of said causes and filed in this court on the 30th day of October, A. D. 1914, for the following reasons and following causes materially affecting the substantial right of said defendant.

First. Irregularity in the proceedings of the Court and jury and order and orders of the Court made at the time and upon the reception of the verdict herein, and abuse of discretion of the Court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the Court and jury, and rulings and orders of the Court so made, showing such abuse of discretion will more particularly appear by the affidavits of A. A. Gabbs, Z. M. Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached, and the stenographic report of the rulings, orders and actions of the Court at the time and upon receiving and filing the verdicts herein.

Second. Insufficiency of the evidence to justify the aforesaid verdicts and each and all of them rendered in the above-entitled causes consolidated, and said verdicts and each and all of them are against law.

Third. Error in law occurring at the trial and excepted to by the defendants.

M. G. MUNLY and
WINN & BURTON,
Attorneys for Defendant.

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

United States of America,
Territory of Alaska,—ss.**Affidavit.**

J. R. Homer, Wallis George, Z. M. Bradford, D. W. Fales and Charles H. Hall each for himself being first duly sworn on oath deposes and says: That I was one of the members of the trial jury in the above case. Upon entering the courtroom to report on our verdict, after the jury had responded to [71] the roll-call, the question was asked by the judge as to whether the jury had agreed on the verdict, and the foreman, A. A. Gabbs, declared that we had, and asked the judge in open court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The judge asked as to what recommendation or qualifications we wanted, and the foreman thereupon made the statement that, while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jen-

nings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement," or words to that effect, and then, speaking towards the jury Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon in the open court, the foreman wrote in each verdict a recommendation for clemency of the Court, and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to said foreman of the jury, said, "Now, you may make the statement you did on bringing in your verdict," or words to that effect, and the foreman repeated substantially his original statement to the Court.

J. R. HOMER.

WALLIS GEORGE.

Z. M. BRADFORD.

D. W. FALES.

CHARLES H. HALL.

Subscribed and sworn to before me this 31st day of October, A. D. 1914.

NEWARK L. BURTON,

Notary Public for Alaska.

My commission expires November 8, 1917.

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

United States of America,
Territory of Alaska,—ss.**Affidavit.**

A. A. Gabbs, being first duly sworn on oath deposes and says: That I acted as foreman of the trial jury in the above cases. Upon entering the courtroom to report on our verdict after the jury had responded to the roll-call, the question was asked by the judge as to whether the jury had agreed on the verdict and I as foreman declared that we had and asked the judge in the open court as to whether it were possible for us to make any [72] recommendations qualifying or amending the verdict. The judge asked as to what recommendations or qualifications we wanted, and I thereupon made the statement that while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenog-

rapher to take such statement" or words to that effect, and then, speaking towards the jury Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon in the open court I wrote in each verdict a recommendation for clemency of the Court and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to me as foreman of the jury, said, "Now you may make the statement you did on bringing in your verdict," or words to that effect, and I thereupon repeated substantially my original statement to the Court.

A. A. GABBS.

Subscribed and sworn to before me this 31st day of October, A. D. 1914.

NEWARK L. BURTON,
Notary Public for Alaska.

My commission expires November 8, 1917.

Tenth. The Court erred in sentencing the said defendant to pay a fine herein in the sum of \$100.00 and entering and filing the judgment herein against said defendant for said amount, which said judgment was entered and filed in this case on the 31st day of March, 1915.

M. G. MUNLY and
WINN & BURTON,
Attorneys for Defendant.

Copy of the foregoing Assignment of Error re-

ceived this — day of June, A. D. 1915 and service admitted.

JAMES A. SMISER,
United States District Attorney for the District of
Alaska, Division Number One. Atty for Plff.

JNO. J. REAGAN,
Asst. U. S. Atty.

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Assignment of Error. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [73]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Comes now the above-named defendant in the above-entitled case No. 1036-B, which said case is consolidated for trial with cases Nos. 1035-B and 1034-B, and assigns the following errors committed

by the Court on the trial and determination of the said case No. 1036-B, and upon which said errors said defendant will rely upon its prosecution of the Writ of Error in said case and the errors that it will rely on in the Appellate Court:

First. That the Court erred in overruling defendant's demurrer in said case No. 1036-B, which said order was made and entered in said case on the 21st day of September, 1914, before the consolidation of said case for trial with the other two cases mentioned herein. Such ruling was excepted to by the defendant and exception allowed.

Second. The Court erred in not granting the defendant a separate trial in each of said cases mentioned herein, [74] and in making an order, over defendant's objections, consolidating and trying said three cases at one time, which said ruling of the Court was at the time excepted to and exception allowed.

Third. The Court erred in overruling the defendant's objections to the introduction of any testimony or evidence or receiving any evidence by the Court pertaining to any of the alleged charges made in said indictment, or any evidence or testimony which the plaintiff offered to establish defendant's guilt of any of the counts set forth in said indictment, which said objections were presented to and filed with the Court after the empaneling of the jury in said consolidated case and after the first witness on the part of the plaintiff was sworn to testify, which said objections are as follows:

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Objections.

Come now M. G. Munly and Winn & Burton attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this Court against the said Thlinket Packing Company, to wit: Indictment Nos. 1034-B, 1035-B, 1036-B, and after the empaneling of the jury and the first witness on the part of the plaintiff, the United States, being sworn to testify concerning the alleged crime set forth in each and all of the counts set out in the foregoing indictments, and object to any testimony or evidence being introduced, offered or received by this Court pertaining to any of the alleged charges in each and every indictment, and in each and every count set forth in the same upon the following grounds and for the following reasons:

1. That each several indictment and every count thereof does not charge the offense defined and set out in the statute. That each several indictment and every count thereof fails to charge that defend-

ant did unlawfully fish for, take [75] or kill salmon of any species.

3. That each several indictment and every count thereof does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge which he is called upon to defend.

4. That each several indictment and every count thereof fails to allege that said alleged fishing was done during the weekly close season.

5. That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels, or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to permit the free passage of salmon and other fishes, in such a way as to embrace every element of the offense defined by the statute.

6. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the districts or places excepted from the statute viz.: that it was not in Cook's Inlet, the Delta of Copper River, Bering Sea, or waters tributary thereto; or that it was not with one of the excepted forms of gear, viz.: rod, spear or gaff.

7. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the Court to pronounce judgment in case

of conviction according to the right of the case.

M. G. MUNLY and

WINN & BURTON,

Attorneys for Defendant.

Three and One Half: While the witness Earnest P. Walker was on the witness-stand in behalf of the plaintiff the following questions were propounded him by the Government's attorney, which were objected to by the defendant.

Q. Mr. Walker, will you state where the traps are situated that you have testified to here?

Mr. WINN.—We object to the question for the reason that it is incompetent, irrelevant and immaterial under the charges made in the indictments. That insomuch as they haven't set forth in these indictments that the traps are not in open waters or open fields where they can be fished at any and all times and all seasons, the question cannot be answered and no proof can be made thereof for the reason that it hasn't been properly pleaded in the indictments.

The COURT.—The objection will be overruled.

Q. (By Mr. REAGAN.) In what waters?

Mr. WINN.—We object.

The COURT.—Same ruling.

A. The waters of Icy Straits and Chatam Straits in that district.

To the introduction of such testimony an exception was allowed and the Court erred in admitting said evidence over defendant's objection.

Fourth. The Court erred in overruling and denying defendant's motion, filed at the close of plain-

tiff's case and when it rested its case, which said motion requested the Court to grant an instructed verdict in favor of the defendant, the Thlinket Packing Company, or to dismiss said case and grant a nonsuit therein for the lack or want of evidence to establish defendant's guilt of any of the charges set forth in the different counts or any one of the counts set forth in said indictment, which said motion was duly made, filed and presented to the Court, overruled and denied and an exception allowed to the defendant. [76]

The said motion so made and filed with the Court, as aforesaid, is as follows:

Come now M. G. Munly and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit: Indictments Nos. 1034-B, 1035-B and 1036-B, and attorneys for said company in all the counts in each and all of those indictments, and move the Court to direct the jury to bring in a verdict in favor of the Thlinket Packing Company, or to dismiss the proceedings for want of evidence to establish each and all of the counts, or any of the counts, set out in the three indictments above mentioned, upon the following grounds and for the following reasons:

First. That each several indictment and every count therein does not charge the offense defined and set out in the statute; that each several indictment and every count thereof fails to charge that the defendant did unlawfully fish for, take, or kill salmon of any species.

Second. That there is no evidence to establish such fact in the case; that each and all of the several indictments, and each count thereof, did not allege that the defendant failed to close the gate, mouth or tunnel, or raise or lower the heart next to the pot in a trap that is designed and used by the defendant to fish for, take or kill salmon of any species, and that there is no evidence in the case to establish such fact.

Third. That each of the several indictments and every count therein does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge of which he is called upon to defend.

Fourth. That each several indictment, and every count thereof, fails to allege that the said alleged fishing was done during the closed season.

Fifth. That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to prevent the free passage of salmon in such a way as to embrace every element of the offense defined by the statute.

Sixth. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the district or place excepted from the statute, that is, it was not in Cook's Inlet, the Delta of the Copper River, Bering Sea, or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz: rod, spear, or gaff, and that there is no evidence now before the jury to

show as to whether or not, if any crime was committed, that it was committed within the prohibited districts of the waters of Alaska as defined by the section under which the indictments are made.

Seventh. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such a manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the Court to pronounce judgment in case of conviction according to the right of the case.

Eighth. That there is no evidence in the case on the part of the Government to disprove the fact or to show as to whether or not the way the respective traps were opened that there could or could not be a free passage of salmon and other fishes, counsel for the defendant company claiming that the reasonable construction of the statute is that if the trap was open in such a way so that it did not prevent the free passage of salmon and [77] other fishes, then the spirit of the statute is complied with; that the only thing the statute is intended to prohibit is the free running of salmon and other fishes, and that is an element which it is incumbent upon the Government to establish before it can establish any charge against the defendant company.

Fifth. The Court erred in failing and refusing to instruct the jury as requested by the defendant and to give to the said jury the instructions or any of them tendered and requested in said case by said defendant and its attorneys at the close of all the tes-

timony and evidence on the part of plaintiff and defendant, which said refusal of the Court to so instruct the jury was duly excepted to by plaintiff and exception allowed. The said instructions so offered and requested by defendant and on file herein are as follows, to wit:

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Instructions.

INSTRUCTION NO. 1.

Gentlemen of the Jury, this is a criminal case consisting of three indictments against the defendant, and each indictment containing two or more counts or charges, each countercharge claiming on the specific date mentioned therein that the defendant violated the fishing laws of Alaska by reason of maintaining and operating certain fish-traps and failing to, in some instances or some of the counts, to raise or lower the web of that part of the trap known as the heart, as required by law, and in other counts charging this last matter and also the failure to close what is known as the tunnel leading from the heart of the trap to the pot, as required by law. It is necessary for the Government to prove these facts last mentioned beyond a reasonable doubt before you would be justified in finding the defendant guilty of

any one or more of the counts contained in the three indictments referred to herein. And should the Government fail to prove to your mind beyond a reasonable doubt that the facts mentioned herein are true, then, it is your duty to acquit the defendant.

INSTRUCTION NO. 2.

I also instruct you, Gentlemen of the Jury, that the purpose and spirit of the law is to protect salmon so that they may not be obstructed in their passage to their spawning ground during the weekly close season. Unless the Government in this case prove to your mind beyond a reasonable doubt that the web of [78] the heart of any trap described in any of these various indictments or various counts was not raised, opened or lowered in such a manner as to permit the free passage of salmon or other fishes to escape and go to their spawning ground, then, it is your duty to return a verdict of "Not Guilty" herein.

INSTRUCTION NO. 3.

The statute provides that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes during the weekly close season. As a matter of fact, if you find in any of the cases or charges against the defendant that 25 feet of the webbing of the heart was so lifted or lowered to permit the free passage of salmon or other fishes, your verdict must be for the defendant, and in this connection the statute does not mean that 25 feet of the heart of a trap must be raised or lowered vertically; if 25 feet of the webbing is lifted or lowered in a "V" shape but yet in such manner

as to permit the free passage of salmon and other fishes such opening is a sufficient compliance with the statute and your verdict must be for the defendant.

INSTRUCTION No. 4.

The language of the statute is that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. That does not mean 25 feet square or that 25 feet must be torn out of the sides of the heart every weekly close season. Any manner of lowering or lifting 25 feet of the heart so as to permit the free passage of salmon and other fishes so that they may go on through the trap to their spawning ground is sufficient. And if you find as to any of the charges in these indictments that the heart of any trap was so lifted or lowered or opened, your verdict must be for the defendant.

INSTRUCTION No. 5.

I also instruct you that the right of fishing, or of fishery as it is called, is common and free to every citizen. The government has, however, the power to regulate and restrict it. This right to free fishing can only be limited or taken away just as far as any such regulations go; and, therefore, the regulations regarding salmon traps during the weekly close season established by the Government cannot be extended or expanded beyond their strict meaning. The statute says that:

“Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all sta-

tionary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side of the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes."

Unless the language of the statute itself provided that twenty-five feet of the heart on each side next to the pot should be lifted or lowered from the top to the bottom of the heart, it would be adding to the statute to say so.

You must consider the law as it is. You must determine from the evidence whether 25 feet of the web of the heart on each side of the pot was lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If you find that it was so lowered or lifted in any of the charges against this defendant alleged in the various indictments, you must acquit the defendant. [79]

Sixth. The Court erred in giving to the jury the following instruction:

"Now, that is a positive demand, gentlemen, that twenty-five feet of that net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that that twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide that window--pane in two parts.

Suppose that window-pane were actually in two separate parts, so each part could be lowered or raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating.) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way,—I am asking you to raise or lower it. Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of twenty-five feet.”

To all of which said instruction defendant duly excepted at the time that same was given and an exception was allowed.

Seventh. The Court erred in receiving and filing the verdict of the jury in this case over defendant's objection made thereto, which said objection to the reception and filing of said verdict was made and based upon the statements made by Mr. Gabbs, the foreman of the jury, at the time the jury came into court to deliver its verdict, which said statements are more particularly set out in the record herein, and by the affidavit of Mr. Gabbs, foreman of the petit jury, and other jurors. Said affidavits are set

forth in Assignment of Error Number IX.

Eighth. The Court erred in overruling defendant's motion filed herein on the 18th day of January, 1915, which is as follows:

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant.

Motion.

Comes now the defendant in the above-entitled cause by its attorneys M. G. Munly and Winn & Burton and moves the Court [80] that the verdict of the jury to the indictments in the above-entitled cause be set aside or considered and treated as a verdict of acquittal, and that the defendant be discharged upon the following grounds and for the following reasons, to wit:—*viz.*:

I.

Because the true verdict of the jury as expressed by the jurors through their foreman in open court at the close of the trial of the above-entitled cause and after they had retired to the jury-room and deliberated upon their verdict and at the time of bringing in their verdict into court, was to the effect that defendant had not violated the spirit of the law under which the aforesaid indictments were returned against the above named defendant.

II.

Because the verdict of the jury to the effect that the defendant had not violated the spirit of the law is the equivalent of a general verdict of "not guilty."

III.

Because such a verdict does not affirmatively find the defendant guilty of all the elements of the crime charged in the indictments.

IV.

Because sentence cannot be passed upon a defendant based upon a verdict other than that of guilty, and the true verdict of the jury in this case was to the effect that the defendant was not guilty of a violation of the spirit of the law.

V.

Because any judgment which might be rendered in the above-entitled cause based upon a verdict of guilty would be founded upon a verdict which does not specifically find the defendant guilty of all the elements constituting the offense or offenses charged in the indictment and such judgment would be null and void.

VI.

Because said verdict is not responsive to the issues.

M. G. MUNLY,
WINN & BURTON,

Attorneys for Defendant.

Ninth. The Court erred in overruling and denying defendant's motion for a new trial herein, which

said motion with the affidavits in support thereof are as follows: [81]

Nos. 1034-B, 1035-B, 1036-B—Consolidated.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Motion for New Trial.

Comes now the above-named defendant, by its attorneys, M. G. Munly and Winn & Burton, in each of the above-entitled numbered causes consolidated, and feeling itself aggrieved herein, moves the Court to set aside each and all of the verdicts rendered in said causes No. 1034-B, 1035-B and 1036-B against the said defendant in each of said causes and filed in this court on the 30th day of October, A. D. 1914, for the following reasons and following causes materially affecting the substantial right of said defendant.

First. Irregularity in the proceedings of the Court and jury and order *and orders* of the Court made at the time and upon the reception of the verdict herein, and abuse of discretion of the Court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the Court and jury, and rulings and orders of the Court so made, showing such abuse of discretion will more particularly appear by the

affidavits of A. A. Gabbs, Z. M. Bradford, Joe Pip-pin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached, and the stenographic report of the rulings, orders and actions of the Court at the time and upon receiving and filing the verdicts herein.

Second. Insufficiency of the evidence to justify the aforesaid verdicts and each and all of them rendered in the above-entitled causes consolidated, and said verdicts and each and all of them are against law.

Third. Error in law occurring at the trial and excepted to by the defendants.

M. G. MUNLY and
WINN & BURTON,
Attorneys for Defendant.

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Affidavit.

United States of America,
Territory of Alaska,—ss.

J. R. Homer, Wallis George, Z. M. Bradford, D. W. Fales and Charles H. Hall each for himself being first duly sworn on oath deposes and says: That I was one of the members of the trial jury in the above case. Upon entering the courtroom to report on our

verdict, after the jury had responded to [82] the roll-call, the question was asked by the judge as to whether the jury had agreed on the verdict, and the foreman, A. A. Gabbs, declared that we had, and asked the judge in open court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The judge asked as to what recommendation or qualifications we wanted, and the foreman thereupon made the statement that, while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement," or words to that effect and then, speaking towards the jury, Judge Jennings, said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon in the open court, the foreman wrote in each verdict a recommendation for clemency of the Court, and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to said foreman of the jury, said, "Now, you may make the statement you did on bringing in your verdict," or words to that effect, and the foreman re-

peated substantially his original statement to the Court.

J. R. HOMER.
WALLIS GEORGE.
Z. M. BRADFORD.
D. W. FALES.
CHARLES H. HALL.

Subscribed and sworn to before me this 31st day of October, A. D. 1914.

NEWARK L. BURTON,
Notary Public for Alaska.

My commission expires November 8, 1917.

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Affidavit.

United States of America,
Territory of Alaska,—ss.

A. A. Gabbs, being first duly sworn, on oath deposes and says: that I acted as foreman of the trial jury in the above cases. Upon entering the courtroom to report on our verdict after the jury had responded to the roll-call, the question was asked by the judge as to whether the jury had agreed on the verdict and I as foreman declared that we had

and asked the judge in the open court as to whether it were possible for us to make any [83] recommendations qualifying or amending the verdict. The Judge asked as to what recommendations or qualifications we wanted, and I thereupon made the statement that, while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement" or words to that effect, and then, speaking towards the jury Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon in the open court I wrote in each verdict a recommendation for clemency of the Court and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to me as foreman of the jury, said, "Now, you may make the statement you did on bringing in your verdict," or words to that effect, and I thereupon repeated substantially my original statement to the Court.

A. A. GABBS.

Subscribed and sworn to before me this 31st day of October, A. D. 1914.

NEWARK L. BURTON,
Notary Public for Alaska.

My commission expires November 8, 1917.

Tenth. The Court erred in sentencing the said defendant to pay a fine herein in the sum of \$100.00 and entering and filing the judgment herein against said defendant for said amount, which said judgment was entered and filed in this case on the 31st day of March, 1915.

M. G. MUNLY and
WINN & BURTON,
Attorneys for Defendant.

Copy of the foregoing Assignment of Error received this —— day of June, A. D. 1915, and service admitted.

JAMES A. SMISER,
United States District Attorney for the District of
Alaska, Division Number One.

Atty. for Plff.
By JNO. J. REAGAN,
Asst. U. S. Atty.

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Assignment of Error. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska. First Division. Jun. 11, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [84]

OFFICE COPY.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Petition for Writ of Error.

To the Honorable R. W. JENNINGS, Judge of the
Above-entitled Court:

Comes now the Thlinket Packing Company, a corporation, the defendant herein, and complains and states that on the 30th day of October, 1914, the jury returned a verdict herein finding the said defendant guilty of the crime charged in the indictment in this case, and on the 31st day of March, 1915, the above-entitled court rendered judgment on said verdict and sentenced the said defendant to pay a fine of \$100.00, and in proceedings had prior thereto in the above-entitled case, certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the Assignment of Errors which is filed with this Petition; and the defendant feeling itself aggrieved by said verdict, judgment, sentence and errors complained of, petitions and prays this Honorable Court for an order allowing the defendant to prosecute a Writ of Error

in the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws in such cases made and provided for the correction of the errors complained of; and that a transcript of the record [85] and proceedings with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing the amount for a supersedeas in said cause and that an order be made staying proceedings and execution in said case until the further order of the said Court of Appeals, and pending the prosecution of its said Writ of Error as aforesaid.

JNO. R. WINN,

WINN & BURTON,

Attorneys for Defendant.

Due service of a copy of the within Petition for Writ of Error is admitted this 23d day of June, 1915.

JNO. J. REAGAN,

Asst. United States District Attorney for the District of Alaska, Division Number One.

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a corporation, Defendant. Petition for Writ of Error. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. [86]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Petition for Writ of Error.

To the Honorable R. W. JENNINGS, Judge of the
Above-entitled Court:

Comes now the Thlinket Packing Company, a corporation, the defendant herein, and complains and states that on the 30th day of October, 1914, the jury returned a verdict herein finding the said defendant guilty of the crime charged in the indictment in this case, and on the 31st day of March, 1915, the above-entitled court rendered judgment on said verdict and sentenced the said defendant to pay a fine of \$100.00, and in proceedings had prior thereto in the above-entitled case, certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the Assignment of Errors which is filed with this Petition; and the defendant feeling itself aggrieved by said verdict, judgment, sentence and errors complained of, petitions and prays this Honorable Court for an order allowing the defendant to prosecute a Writ of Error in the United States Circuit Court of Appeals

for the Ninth Circuit, under and according to the laws in such cases made and provided for the correction of the errors complained of; and that a transcript of the record [87] and proceedings with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing the amount for a supersedeas in said cause and that an order be made staying proceedings and execution in said case until the further order of said Court of Appeals, and pending the prosecution of its said Writ of Error as aforesaid.

JNO. R. WINN and
WINN and BURTON,
Attorneys for Defendant.

Due service of a copy of the within Petition for Writ of Error is admitted this 23d day of June, 1915.

JNO. J. REAGAN,
Asst. United States District Attorney for the District of Alaska, Division Number One.

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Petition for Writ of Error. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. [88]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Petition for Writ of Error.

To the Honorable R. W. JENNINGS, Judge of the
Above-entitled Court:

Comes now the Thlinket Packing Company, a corporation, the defendant herein, and complains and states that on the 30th day of October, 1914, the jury returned a verdict herein finding the said defendant guilty of the crime charged in the indictment in this case, and on the 31st day of March, 1915, the above-entitled Court rendered judgment on said verdict and sentenced the said defendant to pay a fine of \$100.00, and in proceedings had prior thereto in the above-entitled case, certain errors were committed to the prejudice of this defendant, all of which will appear in detail from the Assignment of Errors which is filed with this petition; and the defendant feeling itself aggrieved by said verdict, judgment, sentence and errors complained of, petitions and prays this Honorable Court for an order allowing the defendant to prosecute a Writ of Error in the

United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws in such cases made and provided for the correction of the errors complained of; and that a transcript of the record [89] and proceedings with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendant further prays for an order fixing the amount for a supersedeas in said cause and that an order be made staying proceedings and execution in said case until the further order of the said Court of Appeals, and pending the prosecution of its said Writ of Error as aforesaid.

JNO. R. WINN and
WINN & BURTON,
Attorneys for Defendant.

Due service of a copy of the within Petition for Writ of Error is admitted this 23d day of June, 1915.

JNO. J. REAGAN,
Asst. United States District Attorney for the District of Alaska, Division Number One.

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1, United States of America, Plaintiff, vs. Thlinket Packing Company, Defendant. Petition for Writ of Error. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. [90]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Order Allowing Writ of Error.

Upon the filing by defendant in the above-entitled action of the Petition for a Writ of Error and Assignment of Errors, together with a Bill of Exceptions,

IT IS HEREBY ORDERED that a Writ of Error be, and the same is hereby, allowed, to have the Judgment of this Court reviewed by the Circuit Court of Appeals for the Ninth Circuit as prayed for in said Petition; and

IT IS FURTHER ORDERED that upon the said defendant filing a good and sufficient bond herein with sureties approved by this Court in the sum of \$400.00, that all proceedings and execution herein be stayed and suspended pending the determination of said Writ of Error in said Court of Appeals.

Done in open court this 23d day of June, 1915.

ROBERT W. JENNINGS,

Judge.

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1, United

States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Order Allowing Writ of Error. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. [91]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Order Allowing Writ of Error.

Upon the filing by defendant in the above-entitled action of the Petition for a Writ of Error and Assignment of Errors, together with a Bill of Exceptions,

IT IS HEREBY ORDERED that a Writ of Error be, and the same is hereby, allowed, to have the Judgment of this Court reviewed by the Circuit Court of Appeals for the Ninth Circuit as prayed for in said Petition; and

IT IS FURTHER ORDERED that upon the said defendant filing a good and sufficient bond herein with sureties approved by this Court in the sum of \$400.00 that all proceedings and execution herein be

stayed and suspended pending the determination of said Writ of Error in said court of Appeals.

Done in open court this 23d day of June, 1915.

ROBERT W. JENNINGS,
Judge.

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Order Allowing Writ of Error. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. [92]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Order Allowing Writ of Error.

Upon the filing by defendant in the above-entitled action of the Petition for a Writ of Error and Assignment of Errors, together with a Bill of Exceptions,

IT IS HEREBY ORDERED that a Writ of Error be, and the same is hereby, allowed, to have the Judg-

ment of this Court reviewed by the Circuit Court of Appeals for the Ninth Circuit as prayed for in said Petition; and

IT IS FURTHER ORDERED that upon the said defendant filing a good and sufficient bond herein with sureties approved by this Court in the sum of \$400.00 that all proceedings and execution herein be stayed and suspended pending the determination of said Writ of Error in said Court of Appeals.

Done in open court this 23d day of June, 1915.

ROBERT W. JENNINGS,

Judge.

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Order Allowing Writ of Error. Winn & Burton, Attorneys for Defendant, Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. [93]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Writ of Error.

United States of America.

The President of the United States of America, to
the Honorable ROBERT W. JENNINGS,
Judge of the District Court for the District of
Alaska, Division Number One, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea in the said
District Court before you, between the United
States of America, Plaintiff, and Thlinket Packing
Company, a Corporation, Defendant, manifest er-
ror hath happened to the great prejudice of the de-
fendant, Thlinket Packing Company, as is stated
and appears in the Petition herein.

We being willing that error, if any hath happened,
should be duly corrected, and full and speedy justice
be done to the party aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid with all things
concerning the same to the United States Circuit
Court of Appeals for the 9th Circuit, at San Fran-
cisco, California, together with this Writ, so that
you have the same at said place before said Court
on the 26th day of July, [94] 1915; that the rec-
ord and proceedings aforesaid being inspected, the
said Circuit Court of Appeals may cause further
to be done therein to correct those errors, which of
right and according to law and custom of the United
States ought to be done.

WITNESS the Honorable EDWARD DOUG-
LASS WHITE, Chief Justice of the United States,

the 26th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal]

J. W. BELL,

Clerk of the District Court for the District of Alaska,
Division Number One.

Said Writ is by me allowed:

ROBERT W. JENNINGS,

Judge of the District Court for the District of
Alaska, Division Number One.

Copy of this Writ of Error received and service
acknowledged this 26th day of June, 1915.

JNO. J. REAGAN,

Asst. United States District Attorney for the First
Judicial Division, District of Alaska, and Attor-
ney for Plaintiff and Defendant in Error. [95]

[Endorsed]: No. 1034-B. In the District Court
for the Territory of Alaska, Division No. 1. United
States of America, Plaintiff, vs. Thlinket Packing
Company, a Corporation, Defendant. Writ of Er-
ror.

Filed in the District Court, District of Alaska,
First Division. Jun. 23, 1915. J. W. Bell, Clerk.
By —————, Deputy. [96]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Writ of Error.

United States of America.

The President of the United States of America, to
the Honorable ROBERT W. JENNINGS,
Judge of the District Court for the District of
Alaska, Division Number One, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea in the said
District Court before you, between the United States
of America, Plaintiff, and Thlinket Packing Com-
pany, a Corporation, Defendant, manifest error hath
happened to the great prejudice of the defendant,
Thlinket Packing Company, as is stated and appears
in the Petition herein.

We being willing that error, if any hath happened,
should be duly corrected, and full and speedy justice
be done to the party aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid with all things
concerning the same to the United States Circuit

Court of Appeals for the 9th Circuit, at San Francisco, California, together with this Writ, so that you have the same at said place before said Court on the 26th day of July, [97] 1915; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 26th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal]

J. W. BELL,

Clerk of the District Court for the District of Alaska,
Division Number One.

Said Writ is by me allowed:

ROBERT W. JENNINGS,

Judge of the District Court for the District of
Alaska, Division Number One.

Copy of this Writ of Error received and service acknowledged this 26th day of June, 1915.

JNO. J. REAGAN,

Asst. United States District Attorney for the First
Judicial Division, District of Alaska, and Attor-
ney for Plaintiff and Defendant in Error. [98]

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Writ of Error.

Filed in the District Court, District of Alaska,
First Division. Jun. 23, 1915. J. W. Bell, Clerk.
By —————, Deputy. [99]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Writ of Error.

United States of America.

The President of the United States of America, to
the Honorable ROBERT W. JENNINGS,
Judge of the District Court for the District of
Alaska, Division Number One, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea in the said
District Court before you, between the United States
of America, Plaintiff, and Thlinket Packing Com-
pany, a Corporation, Defendant, manifest error hath
happened to the great prejudice of the defendant,
Thlinket Packing Company, as is stated and appears
in the Petition herein.

We being willing that error, if any hath happened,
should be duly corrected, and full and speedy justice
be done to the party aforesaid in this behalf, do

command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the 9th Circuit, at San Francisco, California, together with this Writ, so that you have the same at said place before said Court on the 26th day of July, [100] 1915; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 26th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal]

J. W. BELL,

Clerk of the District Court for the District of Alaska,
Division Number One.

Said Writ is by me allowed.

ROBERT W. JENNINGS,

Judge of the District Court for the District of
Alaska, Division Number One.

Copy of this Writ of Error received and service
acknowledged this 26th day of June, 1915.

JNO. J. REAGAN,

Asst. United States District Attorney for the First
Judicial Division, District of Alaska, and At-
torney for Plaintiff and Defendant in Error.

[101]

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Writ of Error. Filed in the District Court, District of Alaska, First Division. Jun. 23, 1915. J. W. Bell, Clerk. By _____, Deputy. [102]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Citation (on Writ of Error).

United States of America,

The President of the United States to the United States of America, and JAMES M. SMISER, District Attorney for the First Judicial Division, District of Alaska, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, within 30 days from the date of the service upon you and date of this citation, pursuant to a Writ of Error filed in the United States District

Court for the District of Alaska, Division Number One, at Juneau, Alaska, wherein the United States of America is plaintiff, or defendant in error, and the Thlinket Packing Company, a corporation, defendant, or plaintiff in error, to show cause, if any there be, why the judgment in said Writ of Error should not be [103] corrected and speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 26th day of June, in the year of our Lord, one thousand nine hundred and fifteen.

ROBERT W. JENNINGS,
Judge of the District Court, for the District of
Alaska, Division Number One.

Copy of this Citation received and service acknowledged this 26th day of June, A. D. 1915.

JNO. J. REAGAN,
Asst. United States District Attorney for the District of Alaska, Division Number One, and Attorney for the Plaintiff, or Defendant in Error.
[104]

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Citation. Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. By _____, Deputy. [105]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Citation (on Writ of Error).

United States of America.

The President of the United States to the United
States of America, and JAMES M. SMISER,
District Attorney for the First Judicial Division,
District of Alaska, Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit at the courtroom of said
court in the city of San Francisco, in the State of
California, within 30 days from the date of the
service upon you and date of this citation, pursuant
to a Writ of Error filed in the United States District
Court for the District of Alaska, Division Number
One, at Juneau, Alaska, wherein the United States
of America is plaintiff, or defendant in error, and
the Thlinket Packing Company, a corporation, de-
fendant, or plaintiff in error, to show cause, if any
there be, why the judgment in said Writ of Error
should not be [106] corrected and speedy justice
should not be done to the parties in this behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 26th day of June, in the year of our Lord, one thousand nine hundred and fifteen.

ROBERT W. JENNINGS,
Judge of the District Court for the District of
Alaska, Division Number One.

Copy of this Citation received and service acknowledged this 26th day of June, A. D. 1915.

JNO. J. REAGAN,
Asst. United States District Attorney for the District of Alaska, Division Number One, and Attorney for the Plaintiff, or Defendant in Error.
[107]

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Citation. Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. By _____, Deputy. [108]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Citation (on Writ of Error).

United States of America.

The President of the United States to the United States of America, and JAMES M. SMISER, District Attorney for the First Judicial Division, District of Alaska, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, within 30 days from the date of the service upon you and date of this citation, pursuant to a Writ of Error filed in the United States District Court for the District of Alaska, Division Number One, at Juneau, Alaska, wherein the United States of America is plaintiff, or defendant in error, and the Thlinket Packing Company, a corporation, defendant, or plaintiff in error, to show cause, if any there be, why the judgment in said Writ of Error should not be [109] corrected and speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 26th day of June, in the year of our Lord, one thousand nine hundred and fifteen.

ROBERT W. JENNINGS,
Judge of the District Court for the District of
Alaska, Division Number One.

Copy of this Citation received and service acknowledged this 26th day of June, A. D. 1915.

JNO. J. REAGAN,

Asst. United States District Attorney for the District of Alaska, Division Number One, and Attorney for the Plaintiff, or Defendant in Error.
[110]

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Citation. Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. By ——— Deputy. [111]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034—B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Undertaking [on Writ of Error in Case No. 1034-B].

KNOW ALL MEN BY THESE PRESENTS that we, the above-named defendant, Thlinket Packing Company, a corporation, as principal, and B. M. Behrends as surety, are held and firmly bound unto the United States of America in the penal sum of

\$400.00 for which payment well and truly made, we bind ourselves, each of ourselves, our successors in office, our heirs, and each of our heirs, executors, administrators, and assigns firmly by these presents.

Sealed with our seals and dated this 24th day of June, 1915.

The condition of the above obligation is such that whereas the above-named defendant, Thlinket Packing Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled case by the District Court for the District of Alaska, Division Number One, rendered entered and made by the said last mentioned court on the 31st day of March, 1915, and whereby, and by the terms of which the said defendant, Thlinket Packing Company, a corporation, was fined and sentenced [112] to pay a fine of the sum of \$100.00 for the crime complained of in the indictment in this case, to wit, the crime of unlawful fishing under section 5, Act of June 26, 1906, entitled, "An Act for the Protection and Regulation of the Fisheries of Alaska."

NOW, THEREFORE, the condition of this obligation is such if the above-named Thlinket Packing Company, a corporation, shall prosecute its Writ of Error to effect, and answer all costs and damages if it shall fail to make good its plea, and shall at all times render itself amenable to the orders and process of this court or the appellate court, and render itself in execution if the judgment of this court is affirmed, on any judgment of this court, or said

appellate court, or any court to which it may be appealed, or removed by Writ of Error, then this obligation shall be void; otherwise to remain in full force and virtue.

THLINKET PACKING COMPANY,

By JAS. T. BARRON,

President.

B. M. BEHREND'S.

O. K.—JNO. J. REAGAN,

Asst. U. S. Atty.

United States of America,

Territory of Alaska,—ss.

B. M. Behrends, being first duly sworn on oath deposes and says: That I am the surety on the foregoing bond; am a resident of the District of Alaska, but not an attorney at law, marshal, clerk of any court, or other officer of any court, and am qualified to be bail, and am worth double the sum specified in the foregoing undertaking, exclusive of property exempt from execution and over and above all just debts and liabilities.

B. M. BEHREND'S.

Subscribed and sworn to before me this 24th day of June, A. D. 1915.

[Seal]

GUY McNAUGHTON,

Notary Public for Alaska.

My commission expires Oct. 24th, 1916.

The foregoing Undertaking and Surety thereon examined and approved.

Done in open court this 26th day of June,
A. D. 1915.

ROBERT W. JENNINGS,

Judge. [113]

[Endorsed]: No. 1034-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a corporation, Defendant. Undertaking. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. [114]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Undertaking [on Writ of Error in Case No. 1035-B].

KNOW ALL MEN BY THESE PRESENTS that we, the above-named defendant, Thlinket Packing Company, a corporation, as principal, and B. M. Behrends as surety, are held and firmly bound unto the United States of America in the penal sum of \$400.00 (Four Hundred Dollars), for which payment well and truly made, we bind ourselves, each of our-

selves, our successors in office, our heirs, and each of our heirs, executors, administrators, and assigns firmly by these presents.

Sealed with our seals and dated this 24th day of June, 1915.

The condition of the above obligation is such that whereas the above-named defendant, Thlinket Packing Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the above-entitled case by the District Court for the District of Alaska, Division Number One, rendered entered and made by the said last mentioned court on the 31st day of March, 1915, and whereby, and by the terms of which the said defendant, Thlinket Packing Company, a corporation, was fined and sentenced [115] to pay a fine of the sum of \$100.00 for the crime complained of in the indictment in this case, to wit; the crime of unlawful fishing under section 5, Act of June 26, 1906, entitled, "An Act for the Protection and Regulation of the Fisheries of Alaska."

NOW, THEREFORE, the condition of this obligation is such if the above-named Thlinket Packing Company, a corporation, shall prosecute its Writ of Error to effect, and answer all costs and damages if it shall fail to make good its plea, and shall at all times render itself amenable to the orders and process of this court or the appellate court, and render itself in execution if the judgment of this court is affirmed, on any judgment of this court, or said appellate court, or any court to which it may be appealed, or removed by Writ of Error, then this obliga-

tion shall be void: otherwise to remain in full force and virtue.

THLINKET PACKING COMPANY,

By JAS. T. BARRON,

President.

B. M. BEHREND'S.

O. K. —JNO. J. REAGAN,

Asst. U. S. Atty.

United States of America,

Territory of Alaska,—ss.

B. M. Behrends being first duly sworn on oath deposes and says: That I am the surety on the foregoing bond; am a resident of the District of Alaska, but not an attorney at law, marshal, clerk of any court, or other officer of any court, and am qualified to be bail, and am worth double the sum specified in the foregoing undertaking, exclusive of property exempt from execution and over and above all just debts and liabilities.

B. M. BEHREND'S.

Subscribed and sworn to before me this 24th day of June, A. D. 1915.

[Seal]

GUY McNAUGHTON,

Notary Public for Alaska.

My commission expires Oct. 24th, 1916.

The foregoing undertaking and Surety thereon examined and approved.

Done in open court this 26th day of June, A. D. 1915.

ROBERT W. JENNINGS,

Judge. [116]

[Endorsed]: No. 1035-B. In the District Court for the Territory of Alaska, Division No. 1. United States of America, Plaintiff, vs. Thlinket Packing Company, a corporation, Defendant. Undertaking. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. [117]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1036-B.

UNITED STATES of AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

Undertaking [on Writ of Error in Case No. 1036-B].

KNOW ALL MEN BY THESE PRESENTS that we, the above-named defendant, Thlinket Packing Company, a corporation, as principal, and B. M. Behrends as surety, are held and firmly bound unto the United States of America in the penal sum of \$400.00 (Four Hundred Dollars), for which payment well and truly made, we bind ourselves, each of ourselves, our successors in office, our heirs and each of our heirs, executors, administrators, and assigns firmly by these presents.

Sealed with our seals and dated this 24th day of June, 1915.

The condition of the above obligation is such that whereas the above-named defendant, Thlinket Packing Company, a corporation, has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the above-entitled case by the District Court for the District of Alaska, Division Number One, rendered entered and made by the said last mentioned court on the 31st day of March, 1915, and whereby, and by the terms of which the said defendant, Thlinket Packing Company, a corporation, was fined and sentenced to pay a fine of the sum of \$100.00 for the crime complained of in the indictment in this case, to wit, the crime of unlawful fishing under section 5, Act of June 26, 1906, entitled, "An Act for the Protection and Regulation of the Fisheries [118] of Alaska."

NOW, THEREFORE, the condition of this obligation is such if the above-named Thlinket Packing Company, a corporation, shall prosecute its Writ of Error to effect, and answer all costs and damages if it shall fail to make good its plea, and shall at all times render itself amenable to the orders and process of this court or the Appellate Court, and render itself in execution if the judgment of this court is affirmed, or any judgment of this court, or said Appellate Court, or any court to which it may be appealed, or removed by Writ of Error, then this

obligation shall be void; otherwise to remain in full force and virtue.

THLINKET PACKING COMPANY,

By JAS. T. BARRON,

President.

B. M. BEHREND'S.

O. K—JNO. J. REAGAN,

Asst. U. S. Atty.

United States of America,

Territory of Alaska,—ss.

B. M. Behrends, being first duly sworn, on oath deposes and says: That I am the surety on the foregoing bond; am a resident of the District of Alaska, but not an attorney at law, marshal, clerk of any court, or other officer of any court, and am qualified to be bail, and am worth double the sum specified in the foregoing undertaking, exclusive of property exempt from execution and over and above all just debts and liabilities.

B. M. BEHREND'S.

Subscribed and sworn to before me this 24th day of June, A. D. 1915.

[Seal]

GUY McNAUGHTON,

Notary Public for Alaska.

My commission expires Oct. 24th, 1916.

The foregoing Undertaking and Surety thereon examined and approved.

Done in open court this 26th day of June, A. D. 1915.

ROBERT W. JENNINGS,

Judge.

[Endorsed]: No. 1036-B. In the District Court for the Territory of Alaska, Division No. 1, United States of America, Plaintiff, vs. Thlinket Packing Company, a Corporation, Defendant. Undertaking. Winn & Burton, Attorneys for Defendant. Juneau, Alaska. Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. [119]

*In the District Court for the District of Alaska,
Division No. One.*

Nos. 1034-B, 1035-B and 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant. [120]

Transcript of Evidence.

*In the District Court for the District of Alaska,
Division No. One*

Nos. 1034-B, 1035-B and 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

TRANSCRIPT OF EVIDENCE.

J. J. REAGAN, U. S. Attorney, and H. H. FOLSOM, Assistant U. S. Attorney, attorneys for plaintiff;

M. G. MUNLEY and WINN & BURTON, Attorneys for Defendant.

Hon. ROBERT W. JENNINGS, Judge of U. S. District Court, District of Alaska, Division No. One. [121]

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(This case came on for trial at 11:45 A. M., October 27, 1914, Messrs. J. J. Reagan and H. H. Folsom representing the Government, and Messrs. M. G.

Munley and Winn & Burton appearing for the defendant. The regular panel being exhausted, the Court ordered an open venire for eighteen jurymen, returnable at two o'clock; whereupon Court adjourned until 2 o'clock P. M., the same day, when Court reconvened pursuant to adjournment. By consent, the three indictments, Nos. 1034-B, 1035-B, and 1036-B, were consolidated for the purpose of trial. The jury was duly qualified, selected, empaneled and sworn, no exceptions having been taken during their examination. Whereupon the jury was admonished and the Court took a recess for ten minutes, after which, the Court, jury and counsel being present, opening statements were made by Mr. Reagan and Mr. Winn. Whereupon the jury was admonished and Court adjourned until 10 A. M., October 28, 1914, when Court reconvened pursuant to adjournment. The jury was called and all being present, the following proceedings were had:~) [123]

[Testimony of Ernest P. Walker, for Plaintiff.]

ERNEST P. WALKER, a witness called and sworn in behalf of the United States, testified as follows:

Direct Examination.

(By Mr. REAGAN.)

Q. Will you state your name, please?

Whereupon M. G. Munly and Winn & Burton, attorneys for the defendant, **Thlinket Packing Company**, in all three of the indictments herein against said company, being numbers 1034-B, 1035-B and

1036-B, filed and interposed the following objections,
to wit: [124]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Objections.

Come now M. G. Munly and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit: Indictments Nos. 1034-B, 1035-B, 1036-B, and after the empaneling of the jury and the first witness on the part of the plaintiff, the United States, being sworn to testify concerning the alleged crime set forth in each and all of the counts set out in the foregoing indictments, and object to any testimony or evidence being introduced, offered or received by this Court pertaining to any of the alleged charges in each and every indictment, and in each and every count set forth in the same upon the following grounds and for the following reasons, to wit:

1. That each several indictment and every count thereof does not charge the offense defined and set

out in the statute. That each several indictment, and every count thereof fails to charge that defendant did unlawfully fish for, take or kill salmon of any species.

2. That each several indictment and every count thereof does not allege that defendant failed to close the gate, mouth or tunnel, or raise or lower web of heart next to the pot in a trap designed and used by defendant to fish for, take or kill salmon of any species.

3. That each several indictment and every count [125] thereof does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge which he is called upon to defend.

4. That each several indictment and every count thereof fails to allege that said alleged fishing was done during the weekly close season.

5. That each several indictment, and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels, or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to permit the free passage of salmon and other fishes, in such a way as to embrace every element of the offense defined by the statute.

6. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the districts or places excepted from the statute, viz.: that it was not in Cook's Inlet, the Delta of the Copper River, Bering

(Testimony of Ernest P. Walker.)

Sea, or waters tributary thereto; or that it was not with one of the excepted forms of gear, viz.: rod, spear or gaff.

7. That each several indictment, and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the Court to pronounce judgment in case of conviction according to the right of the case.

W. G. MUNLY and
WINN & WINN,

Attorneys for Defendant. [126]

The COURT.—Objection overruled.

Mr. WINN.—We will take an exception.

The COURT.—Exception allowed.

A. Ernest P. Walker.

Q. (By Mr. REAGAN.) What position, if any, do you hold at the present time?

A. I am at present Warden, United States Bureau of Fisheries, Alaska Service.

Q. Do you know the defendant company's fish-traps Numbers 1, 2, 3, 3-A, 4, 5, 6, 9, 11, and 12?

A. I do.

Q. Now, Mr. Walker, will you look at this contrivance on this [*127—1†] table and state whether you have seen that before? A. I have.

*Page-number appearing at foot of page of certified Original Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Original Certified Transcript of Record.

(Testimony of Ernest P. Walker.)

Q. What is it, do you know?

Mr. WINN.—We object to that—there has been no foundation laid, the witness has not qualified himself to testify; it is incompetent, irrelevant, and immaterial on the charges made in each and all of the indictments and each and all of the counts in the indictments.

The COURT.—Objection overruled.

A. It is a model of a fish-trap essentially representing the important parts of the heart wall next to the pot and the tunnel.

Mr. WINN.—I move to strike out the answer because it isn't in answer to the question and the witness has gone ahead without qualifying and stated what this structure is.

The COURT.—The motion will be denied.

Q. (By Mr. REAGAN.) Mr. Walker, will you state whether or not the traps of this defendant company of which I have interrogated you previously, can be illustrated with this device—all of the device?

Mr. WINN.—Same objection—no foundation laid; it hasn't been shown that he ever saw a fish-trap.

The COURT.—Same ruling.

A. Yes.

Q. (By Mr. REAGAN.) And especially with reference to the tunnel and heart walls next to the pot in the traps of this defendant company?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

A. Yes. [128—2]

(Testimony of Ernest P. Walker.)

Mr. REAGAN.—For the purpose of illustration, I offer this model in evidence.

Mr. WINN.—Same objection—no foundation. It has not been shown who made it, how it was made, when it was made, or that this witness has ever seen a fish-trap.

The COURT.—What do you offer it as—illustrating what?

Mr. REAGAN.—So that I can illustrate the testimony. I want the jury to know where the heart is—

The COURT.—Ask the witness if that model represents the general construction of a fish-trap—if it shows the spiller, the lead and tunnel. If he testifies to it in that way, it may be admitted for the purpose of illustrating his testimony.

Q. (By Mr. REAGAN.) Will you state what the fact is as to whether or not this model shows the lead—correctly illustrates the lead of a fish-trap such as is used by this defendant company?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

A. It does.

Q. (By Mr. REAGAN.) Does it represent the position of the heart of the traps which are used by this defendant company? A. Yes.

Mr. WINN.—Same objection.

The COURT.—Same ruling, with this understanding: You say, “As used by the defendant company.” That isn’t the question—“As used by traps that are in these indictments.”

(Testimony of Ernest P. Walker.)

Q. (By Mr. REAGAN.) Will you state whether or not it represents the tunnel used in the traps referred to in these indictments? A. Yes.

Mr. WINN.—Same objection.

The COURT.—Same ruling. [129—3]

Q. (By Mr. REAGAN.) Will you state whether or not it correctly represents the pot used in the traps referred to in these indictments?

Mr. WINN.—Same objection.

The COURT.—Objection overruled.

A. Yes.

Q. (By Mr. REAGAN.) Will you state whether or not it substantially represents the spiller referred to in these indictments? A. Yes.

Mr. WINN.—To save time, I wish the same objection urged to every question of this character.

The COURT.—Very well—the record will show that.

Mr. REAGAN.—I ask that this be used for illustrating the testimony of the witness.

Mr. WINN.—We object on the ground that it is incompetent, irrelevant, and immaterial for any purposes of the case or under any of the charges in the indictments, and that the witness has not qualified himself to testify concerning the construction of a fish-trap, or has seen one, or ever constructed one, and hasn't qualified to testify to a matter that is somewhat expert business—the construction of a fish-trap. It can only be done by expert people.

The COURT.—Objection overruled.

(Testimony of Ernest P. Walker.)

Q. (By Mr. REAGAN.) I am going to take up indictment No. 1034-B. Mr. Walker, you say you are Fish Warden, Bureau of Fisheries of the United States. Will you state whether or not, as part of your duties, you patrolled the traps of these waters?

A. I have.

Q. Will you state what the fact is as to whether or not you made any patrol of the traps of the defendant company, Nos. 1, 2, 3, 4, 5, and 6, during the weekly closed season beginning [130-4] at six o'clock post-meridian Saturday, July 11, 1914, and ending at six o'clock ante-meridian, Monday, July 13, 1914?

Mr. WINN.—We object to the question for the reason that there is no such allegation in the indictment, and we deem that one of the material allegations of the indictment and, further, that the witness is not qualified to testify concerning what he might have seen in patrolling the traps.

The COURT.—The first part of your objection, that there isn't anything in the indictment—doesn't it charge that?

Mr. WINN.—It charges on that date but not according to statute.

The COURT.—You make just the general objection?

Mr. WINN.—Yes.

The COURT.—Objection overruled.

A. I did.

Q. (By Mr. REAGAN.) You reached trap No. 1 of the defendant company. Will you state what

(Testimony of Ernest P. Walker.)

the condition of the webbing of the heart of trap No. 1, on each side next to the pot of said trap, was at that time with reference to whether it was open or closed?

Mr. WINN.—I will make one objection to cover this. We object to the question because the witness has not qualified to testify concerning the construction of a trap—of the tunnel or any part of a fish-trap; furthermore, it is incompetent, irrelevant, and immaterial under the charges made in the respective counts in the three indictments which have been consolidated in this case. If it will be understood that that applies to any testimony he gives, I will not have to take up the time of the Court during each question propounded. [131—5]

The COURT.—The objection is overruled, but, Mr. Reagan, this witness has not testified yet to this jury what the heart of the trap is or what the pot of a trap is. Now, you ask him the general question about the webbing of the heart. You should—

Mr. REAGAN.—My intention was to ask him and then illustrate it with this device.

Mr. WINN.—Your Honor understands that this objection goes to each question regarding the illustration of this alleged trap?

The COURT.—Yes, all through.

A. It was not open back as required, twenty-five feet.

Q. (By Mr. REAGAN.) You say it was not opened the required twenty-five feet?

(Testimony of Ernest P. Walker.)

A. It was not.

Q. Will you show the jury by using this device where the heart walls of a trap are located? Just show where they are located.

A. These are the heart walls—walls of the heart. (Indicating.)

Q. Will you show the jurors where the twenty-five feet of the heart walls are next to the pot?

A. Twenty-five feet of the heart walls next to the pot are the heart walls from twenty-five feet—from here back on either side.

Q. Those walls—Are those the walls you alluded to in your answer? A. Those are.

Q. While you are there, will you explain the position of the tunnel?

A. In the normal fishing condition?

Q. No; just point it out to them so they can see with their eyes.

A. The tunnel is represented by this webbing here, leading from the heart into the pot. (Indicating.) [132—6]

Q. Is it, or is it not, located within the pot itself, or within the heart walls? A. Yes.

Q. As to trap No. 2, will you state what the fact is as to whether or not twenty-five feet of the webbing or netting of the heart of that trap was or was not lifted or lowered in such manner as required by the Act?

Mr. WINN.—I object to the question on the same ground. It requires the witness to construe the Act.

(Testimony of Ernest P. Walker.)

Mr. REAGAN.—I will withdraw it and ask him if it was lifted or lowered for twenty-five feet next to the pot?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

A. It was not.

Q. (By Mr. REAGAN.) Now, will you state whether or not the webbing next to the pot in the heart of that trap was open for twenty-five feet back from the pot? A. It was not.

Q. Now, as to trap No. 3. Will you state what the condition of the heart walls of that trap for a space of twenty-five feet on each side next to the pot was during that closed season?

Mr. WINN.—Same objection—to this trap. It will be understood that I am raising the same objection to these different traps—to all questions propounded concerning the same.

The COURT.—Same ruling.

A. It was not raised or lowered, or otherwise removed for that distance.

Q. (By Mr. REAGAN.) As to trap No. 4, on the occasion of your visit to that trap during that closed season; what was the condition of the twenty-five feet of webbing of the heart on each side next to the pot thereof? [133—7]

A. It was not raised or lowered or otherwise opened back for twenty-five feet.

Q. Will you state what was the condition of the tunnel—whether or not the tunnel of that trap was

(Testimony of Ernest P. Walker.)

opened or closed at the time you visited it during that closed season?

A. It was not completely closed.

Q. As to trap No. 5 at the time you visited that trap during that closed season, what was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side next to the pot thereof?

A. It was not raised or lowered or otherwise opened for twenty-five feet.

Q. What was the condition of the tunnel of that trap on the occasion of that visit during that closed season? A. It was not completely closed.

Q. As to trap No. 6—

Mr. WINN.—You understand that the same objection goes to each and every trap and each and every count?

The COURT.—Yes.

Q. (By Mr. REAGAN.) As to trap No. 6, will you state what was the condition of the tunnel of that trap on the occasion of that visit during that closed season?

A. It was not completely closed.

Q. Will you state what was the condition of twenty-five feet of the webbing or net of the heart on each side of the pot thereof during that closed season?

A. It was not raised or lowered or otherwise opened for twenty-five feet.

Q. Now, Mr. Walker, I will ask you whether or

(Testimony of Ernest P. Walker.)

not the heart of each of those traps on the occasion of your visit during that closed season were in such condition as to permit the free [134—8] passage of salmon and other fishes?

Mr. WINN.—Same objection.

The COURT.—I think the objection to that question will be sustained, unless you qualify the witness as to what it takes to permit the free passage of fish. That calls for a conclusion.

Mr. REAGAN.—I will withdraw that question.

Q. Was the webbing of the heart walls on each of those traps opened and, if so, to what extent above the water-line at the time you visited them?

Mr. WINN.—Same objection—to these general questions.

The COURT.—Same ruling.

A. An attempt or pretense had been made of opening each one. I would have to refer to my notes made at the time to give you the exact distance.

Q. (By Mr. REAGAN.) Are they notes you made at the time?

A. Yes, sir, they are notes I made at the time of passing each trap.

Q. Beginning with trap No. 1, if you can, or if you have them in the reverse order, take them that way.

Mr. WINN.—Same general objection about the qualification of the witness—the same general objection.

The COURT.—Same ruling.

Q. (By Mr. REAGAN.) Did you state that you

(Testimony of Ernest P. Walker.)

made those notes yourself at the time? A. Yes.

Q. This is series 1, 2, 3, 4, 5 and 6 of July 11th.

A. Yes. I can take them up by the series of 1, 2, 3, 4, 5 and 6 by running backwards on my notes.

Q. All right.

A. On No. 1, which was visited at 9:49 A. M., morning of the 12th, [135—9] the heart wall was open back approximately four feet—that is, both heart walls.

Q. And for the remaining distance of twenty-one feet how was the heart wall?

A. The webbing was in position for fishing.

Q. Now, go to the next trap, please, No. 2.

A. That was visited at 9:44 A. M. The heart walls were open back about four feet at the water level.

Q. And the other twenty-one feet of that webbing, which would make twenty-five feet—what was the condition of that?

A. That was in perfect fishing condition.

Mr. WINN.—We object. I move to strike out the answer; he hasn't qualified or stated that he knew anything about fish-trap fishing.

The COURT.—Objection overruled and motion denied.

Q. (By Mr. REAGAN.) As to trap No. 3?

A. That was visited at 9:15 A. M. One heart wall was about two feet, the other was about eighteen inches.

Q. As to the heart wall that was opened two feet, what was the condition of the webbing for the remaining twenty-three feet of the twenty-five?

(Testimony of Ernest P. Walker.)

A. That was in the normal—

Mr. WINN.—I object to the question on the ground that it is incompetent, irrelevant, and immaterial, and he hasn't qualified to answer the question.

The COURT.—Mr. Reagan, it seems to me that the question in dispute in this case is whether or not the web was down twenty-five feet.

Mr. REAGAN.—That is what I consider myself.

The COURT.—Why don't you confine your testimony to the things that are in dispute. Objection overruled. [136—10]

Q. (By Mr. REAGAN.) What was the condition of the remaining twenty-three feet?

A. They were in the normal position.

The COURT.—Q. Were they up or were they down the twenty-one feet?

A. The remaining twenty-three feet were up.

Q. Not lowered or not raised?

A. Not lowered or not raised.

Q. (By Mr. REAGAN.) As to trap No. 4, how much of an opening, if any, was there at the junction of the heart walls and pot?

A. I do not have the exact distance, but it was less than twenty-five feet.

Q. As to trap No. 5, how much of an opening was there at the junction of the heart walls and the pot?

A. My notes here read, Tunnel—

Mr. WINN.—I object to what his notes say.

The COURT.—Q. Can you testify without your notes?

A. This will refresh my memory.

(Testimony of Ernest P. Walker.)

Q. Can you testify without looking at the notes?

A. I can't give exact distances.

Q. Can you give it by not looking at the notes?

A. Yes; that is, I can within a foot or two, but not exactly.

The COURT.—Very well, look at your notes.

A. The heart walls there did not exceed four feet.

Q. (By Mr. REAGAN.) As to the next trap?

A. That is, No. 6?

Q. No. 6.

A. One heart wall was opened one foot and the other about three feet.

Q. Was the remaining part of the webbing of the heart—remaining portion of the distance of twenty-five feet raised or lowered or otherwise opened? [137—11] A. It was not.

Q. Now, we will take the next indictment, which is numbered 1035-B. Will you state whether or not during the weekly closed season beginning at 6 o'clock post-meridian, August 8th, which was Saturday, and ending Monday morning, August 10, 1914, at 6 o'clock ante-meridian you visited traps Nos. 11 and 12 of the Thlinket Packing Company, the defendant here? A. I did.

Mr. WINN.—Same objection to the question—incompetent, irrelevant and immaterial, not justified by the allegations in the indictment.

The COURT.—Objection overruled.

Q. (By Mr. REAGAN.) Now, in trap No. 11, will you state what the condition of the heart wall was next to the post on each side of the heart for a

(Testimony of Ernest P. Walker.)

distance of twenty-five feet back during your visit there during that closed season?

A. It was not raised or lowered for a distance of twenty-five feet.

Q. Did you take a photograph of that trap?

A. I took a photograph of that trap the morning, Monday morning following—that is, the morning of the 11th.

Q. At what hour? A. That was after six A. M.

Q. Had the trap—what was the fact as to whether or not the trap had been changed in its condition from the time you saw it the day before?

Mr. WINN.—We object to the question as incompetent, irrelevant and immaterial and he has got to confine it to a certain time. He is going beyond the time stated in the indictment and he says some time after six o'clock.

The COURT.—This question is “if he knows whether [138—12] or not the condition of the trap has been changed between the time he took the photograph and the time he says he examined it.” He may answer the question “yes or no.”

A. It had been partially changed.

Q. (By Mr. REAGAN.) In what respect had there been any change?

Mr. WINN.—We object to that as incompetent, irrelevant and immaterial. It was after the closed season partially changed.

The COURT.—If he knows in what particular it had been changed and that particular is not important to the question in dispute, the testimony is com-

(Testimony of Ernest P. Walker.)

petent to identify the condition of things at the time.
Objection overruled.

A. The tunnel had been drawn out into the pot; that is, it had been changed to what it was on Sunday.

Q. (By Mr. REAGAN.) Were the heart walls changed?

A. The heart walls had not been changed.

Q. Do the photographs show the heart walls?

A. They do.

Q. Have you that photograph with you?

A. I have. I took a series of photographs with two different cameras.

Q. Is this a photograph you took at the time of the conditions then represented of the heart wall?

A. It is one of the photographs which I took.

Mr. REAGAN.—If the Court please, I offer this photograph in evidence.

Mr. WINN.—We object on the ground that it is incompetent, irrelevant and immaterial under the allegations in the count and, further, that the time of taking the photograph has not been designated by the witness except to the extent that it was taken beyond the closed period in that particular count. [139—13]

The COURT.—The objection will be overruled.

(Admitted in evidence and marked Plaintiff's Exhibit "A.")

Q. (By Mr. REAGAN.) Will you show to the jury the opening in the heart walls on that photograph?

Mr. WINN.—If he is going to do it, I wish he

(Testimony of Ernest P. Walker.)

would do it so it will go into the record.

The COURT.—Very well, mark the opening with an X, and show it to the jury.

Mr. WINN.—Same objection.

A. The opening indicated by the mark X at about the water level indicates the opening in the heart walls. (Showing photograph to jury.)

Q. (By Mr. REAGAN.) Now, as to trap No. 12 on the occasion of your visit during that closed season, what was the condition of twenty-five feet of the webbing or net of the heart on each side next to the pot?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

A. It was not raised or lowered for twenty-five feet.

Q. (By Mr. REAGAN.) Will you state whether or not you saw that trap fishing at that time?

A. I did.

Mr. WINN.—I object to the question as incompetent, irrelevant and immaterial under the allegations of the count, or any counts in any of the indictments, and therefore it is not permissible. It is not charged.

The COURT.—Let us see: You object to it as irrelevant, incompetent and immaterial whether the trap was fishing or not?

Mr. WINN.—No, sir, under the allegations in the count, because there is no allegation in the count, so there is no necessity to prove it. [140—14]

The COURT.—The view the Court takes of this

(Testimony of Ernest P. Walker.)

matter is that it doesn't make a particle of difference. Your objection is sustained.

Q. (Mr. REAGAN.) I shall take the next indictment, No. 1036-B. On that same trip during that same closed season, did you visit trap No. 1?

A. I did.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side thereof next to the pot on that occasion during that closed season?

A. It was not open or raised for twenty-five feet.

Q. Or was it otherwise opened? A. No, sir.

Q. What was the condition of the tunnel of that trap on that occasion? A. May I use these notes?

Mr. WINN.—I want to know whether the notes were taken at the time.

The COURT.—If you cannot remember without the notes, refer to them. Did you take these notes at the time? A. Yes.

Q. And you can't testify without looking at the notes with any definiteness?

A. I couldn't be absolutely certain.

The COURT.—Very well, you may testify if you can without them, and if you need them to refresh your memory, you may do so.

Q. (By Mr. REAGAN.) What was the condition of the tunnel during that closed season?

A. There was at least one foot remaining open. [141—15]

Q. Now, as to trap No. 2 on the occasion of your visit to that trap during that closed season, what

(Testimony of Ernest P. Walker.)

was the condition of the webbing or net of the heart for twenty-five feet next to the pot?

A. It was not raised or lowered for twenty-five feet.

Q. Was it otherwise opened for twenty-five feet?

A. It was not.

Q. What was the condition of the tunnel on that trip—on that occasion?

A. It was open approximately eighteen inches.

Q. Now, as to trap No. 3, on the occasion of your visit on that day during that closed season, what was the condition of twenty-five feet of the webbing or net of the heart next to the pot?

A. It was not opened for twenty-five feet—not raised or lowered for twenty-five feet.

Q. Or otherwise opened? A. No.

Q. What was the condition of the tunnel on that trap on that day?

A. There was a slight opening remaining on that.

Q. Now, as to trap No. 4 of this defendant company on the occasion of that visit, from August 8th to August 10th, what was the condition of the webbing or net of the heart of that trap on each side of the pot thereof?

A. It was not raised or lowered for twenty-five feet.

Q. Or was it opened or otherwise?

A. No, not for twenty-five feet.

Q. And what was the condition of the tunnel of that trap on that occasion?

A. It was merely slacked away—that is, not pulled

(Testimony of Ernest P. Walker.)

to one side. Q. Was it closed? [142—16]

A. Not completely.

Q. As to trap No. 5 during that closed season on the occasion of your visit to that trap, what was the condition of twenty-five feet of the webbing or net of the heart on each side of the pot thereof?

A. Number five, you say?

Q. Number four. I said number four—I meant 3-A. A. 3-A?

Q. You have answered as to No. 4; now, I am asking you as to 3-A.

A. 3-A, the heart walls were not raised or lowered or otherwise opened for twenty-five feet.

Q. Next to the pot? A. Yes.

Q. What was the condition of the tunnel of 3-A on that occasion? A. Open about one foot.

Q. Now, as to trap No. 6 on that occasion—on the occasion of that visit—what was the condition of the twenty-five feet of webbing or not of the heart of that trap?

A. It was not raised or lowered or otherwise opened for a distance of twenty-five feet next to the pot.

Q. What was the condition of the tunnel of that trap on that visit, on that occasion?

A. There was opened from eighteen inches to two feet.

Q. Now, as to trap No. 1, what was the condition of the twenty-five feet of the webbing or net of the heart of that trap next to the pot on the occasion of that visit during that closed season?

(Testimony of Ernest P. Walker.)

A. It was not opened for a distance of twenty-five feet—it was neither raised or lowered or otherwise opened.

Q. What was the condition of the tunnel of that trap on the occasion of that visit? [143—17]

A. It was, so far as could be seen, open below the water level; that is, pulled into the pot.

Mr. REAGAN.—That is all.

(Whereupon the jury was admonished and the Court took a recess for five minutes, after which, the Court, jury, and counsel being present, the witness was cross-examined as follows:)

Cross-examination.

(By Mr. WINN.)

Q. How long have you been occupying this position, Mr. Walker? A. Since a year ago last July.

Q. Were you up here last year?

A. I was up here from the last few days of July.

Q. Were you occupying that position or was there some one else occupying this position at that time?

A. I don't understand the question.

Q. Were you occupying this same position at that time that you are now?

A. I was Deputy Warden up until, I believe it was the last few days of September this year, then, owing to a change in the Civil Sundry Bill, it evidently meant a change in titles —no change.

Q. Duties are the same?

A. Duties are the same.

Q. Bowers was up here this last summer?

A. He was up here.

(Testimony of Ernest P. Walker.)

Q. He had your position; were his duties the same?

A. His duties were the same; he was the superior officer.

Q. Superior officer over you? A. Yes, sir.

Q. Who is your superior now? [144—18]

A. For this past summer I have been in immediate charge of the Southeastern Alaska patrol work. Mr. Bower has charge of the Pacific Coast office at Seattle.

Q. When you say that, over what territory or what waters do your duties extend?

A. Our territory has never been definitely defined. I have been as far west as Prince William Sound.

Q. Do you go out as far as Sitka?

A. I haven't been this summer, but our work covers out as far as Yakutat.

Q. Where did you come from to Alaska?

A. I came directly from Colorado.

Q. What did you do there?

A. I had only been in Colorado a short time that particular time. I had been doing some zoological collecting there.

Q. Collecting? A. Zoological collecting.

Q. How long did you say you lived in Colorado prior to coming here?

A. My home had been in Colorado for about—almost four years.

Q. Where were you for three or four years prior to that time? A. Indiana.

Q. Have you ever lived in Wyoming?

(Testimony of Ernest P. Walker.)

A. I have been in Wyoming. I have spent a great portion of two years there, but my home at that time was Colorado.

Q. You never lived on salt water until you came to Alaska? A. No.

Q. Never had any experience with gill-nets or any appliances for catching fish prior to coming to Alaska? A. No.

Q. Had you ever seen a salmon before coming to Alaska? A. Yes, sir. [145—19]

Q. Ever see them in the water before coming to Alaska?

Mr. REAGAN.—I object to the question as irrelevant, incompetent and not cross-examination.

Mr. WINN.—It is for qualifications—

The COURT.—Qualifications for what?

Mr. WINN.—He testified to the construction of a fish-trap.

The COURT.—He didn't testify to the construction of a salmon.

Mr. WINN.—No, but I want to show what experience he has had in this line of business he is in now.

The COURT.—You can test him as to that without asking him whether he saw a salmon or not. Objection sustained.

Q. (By Mr. WINN.) When did you first see a fish-trap? A. When I arrived in Alaska.

Q. While Mr. Bower was here? A. Yes.

Q. Did you take a run around with Bower?

(Testimony of Ernest P. Walker.)

A. Yes, sir.

Q. These fish-traps of the Thlinket Packing Company were operated, fished, while Bower was here as they are now?

Mr. REAGAN.—I object to the question because he hasn't shown that he was here at the time Bower was here.

The COURT.—He may answer whether he knows.

A. I don't know whether these exact traps were or not.

Q. (By Mr. WINN.) Did you see any of these traps while Bower was here?

A. I saw fish-traps; I don't remember the numbers of them.

Q. Do you remember which fish-traps you saw?

A. I saw P. A. F. and probably T. P.; I don't know the different numbers. [146—20]

Q. If you were out with Bower you were inspecting how they were operated? A. Yes, sir.

Q. Don't you know that these Barron traps (I call them Barron traps for short; I mean the defendant's traps)—Don't you know that they were operated and fished that same season while Bower was here as they are now?

Mr. REAGAN.—I object unless he knows.

A. I don't know how many they had.

Q. (By Mr. WINN.) I ask you if they didn't fish the traps the same way while Bower was here that they are fished now?

Mr. REAGAN.—I object to it as irrelevant, in-

(Testimony of Ernest P. Walker.)

competent and immaterial.

A. I don't know that they did fish exactly the same way. I remember they were somewhat the same—I don't know that they were exactly.

Q. And the pull-back pole that opens in the heart pulled back just the same as it does on this, the same as you referred to here, did it not?

Mr. REAGAN.—If you know.

Mr. WINN.—I would rather the witness answer without being cautioned by counsel.

Mr. REAGAN.—Then I can object to the question.

Mr. WINN.—He was in the business.

Mr. REAGAN.—He just came here and he is asking this question and I want to protect the witness about saying something inadvertently about something he does not know.

The COURT.—If the witness knows, he may answer the question.

A. I did not know how they fished them before I came up here.

Q. (By Mr. WINN.) I am not asking about before you came up here— [147—21] I don't suppose you did, you were in Colorado—but I am asking you after you came here while Bower was here.

A. The traps I saw fishing while I was with Bower were operated in the same general way. I don't remember exact distances on those a year ago.

Q. In a general way you mean that the part of the heart you pointed to with that pull-back, or closing

(Testimony of Ernest P. Walker.)

stick, operated in the same way? I am speaking, of course, of the defendant company's traps.

A. I said I did not remember the different—whose traps were operated.

Q. Don't you remember whether you saw any one of these several traps?

A. I don't remember the marks on the traps—I saw traps. I said I saw traps operated in the same general way.

Q. I mean traps of this defendant company.

A. I said I don't remember the marks on the traps.

Q. Don't you know the location of them?

A. Traps are sometimes moved slightly.

Q. Were these removed?

A. I don't remember.

Q. How?

A. I don't know about that.

Q. You couldn't remember, then, from seeing the traps, where they were constructed and whether or not they were placed where you couldn't tell whether they were in the same place this year or not?

A. I am inclined to think some of them were, but I don't know positively.

Q. Then you know you saw some of the Thlinket Packing Company's traps, don't you? [148—22]

Mr. REAGAN.—I object to that. He says he couldn't tell what company's traps he saw, that they were marked, and he doesn't remember the marking.

The COURT.—If he answers it once, he can answer it twice.

(Testimony of Ernest P. Walker.)

A. I said I did not remember the marks on the traps. I don't know whether they were T. P. or what they were.

Q. (By Mr. WINN.) I ask you if you cannot tell the Court and jury as to whether or not some of these traps you have testified to on direct examination are some of the same traps you saw last year. Leave out the marks business.

A. I don't know whether they were the same traps I saw last year or not.

Q. You mean you couldn't go out to any pile of traps last year and look them over irrespective of any marks on them and go back and tell whether those traps were approximately in the same position as last year?

A. I remember that traps which are now Thlinket Packing Company traps are similarly placed to what some traps were last year. I don't remember, though, who owned them.

Q. Who made the examination last year; did you make them or was Bower making the examination?

A. Bower made all the trips but one.

Q. Then you went with him?

A. I was with him one trip and another trip I made myself.

Q. And you were with him when he visited some of these traps of the Thlinket Packing Company?

A. Yes, I suppose they were Thlinket Packing Company if they operated traps there. I haven't said that I knew they operated any.

(Testimony of Ernest P. Walker.)

Mr. REAGAN.—I object to this testimony on the [149—23] further ground that it is not cross-examination. I asked him nothing about last year whatever and it is immaterial anyway. We are making no contention as to what they did last year, whether or not they violated the law last year. The question is what they did at the time these indictments were made or at the time the indictments charged. What they did before has nothing to do with it.

The COURT.—On what theory is it cross-examination?

Mr. WINN.—I am through—I haven't any further questions except on some other things.

Q. The first experience you ever had, or the first time you ever saw a fish-trap, was when you went out with Bower, who was your superior, some time in July or August of last year?

A. I had seen a trap a few days before I went out with Bower.

Q. When was the first one or where was it, do you remember?

A. I saw some trap—it was about the first day of August.

Q. What have you been doing all this summer?

A. What have I been doing?

Q. Yes, what have you been doing?

A. Commencing what date?

Q. Since you came here.

A. I have been in Alaska since the time—I

(Testimony of Ernest P. Walker.)

haven't been out of Alaska except simply on the high seas once or twice.

Q. In Southeastern Alaska?

A. I got out as far as the west side of Prince William Sound once. I was out of Southeastern Alaska about three weeks; that was the longest time.

Q. Generally, how much of the waters of Southeastern Alaska did you cover; did you visit traps about Ketchikan and Wrangell? A. Yes, sir.

Q. And the Buschmann traps and the Pacific American Fisheries [150—24] Company's traps and the company that operates near Hoonah, and the traps of George Myers,—did you visit over all that territory?

A. I have been on only one Sunday trap patrol on the lower district—two rather—I saw the Pillar Bay trap one Sunday, and then on Sunday, July 5th, I saw four or five traps; that was at the beginning of the season. That was on the Wrangell run.

Q. About how many traps in addition to the Thlinket Packing Company traps did you see during the season?

A. How many did I see this season in addition?

Q. Yes.

Mr. REAGAN.—I object to it as immaterial.

The COURT.—Objection overruled.

A. My notes could give you exactly.

Q. (By Mr. WINN.) Well, approximately, without the notes—I don't care to go into detail on it.

A. I would say maybe fifty, might be ten more or ten less.

(Testimony of Ernest P. Walker.)

Q. In addition to these traps of the defendant company in this case, did you visit any of the Northwestern Fisheries Company's traps? A. I did.

Q. Now, Mr. Walker, commencing with indictment No. 1034-B, I want to ask you a few questions concerning the counts contained in that. The first count contained in that is T. P. Co.'s No. 1, and the date that you have here is July 12th. What time did you say you were at that trap on that day?

A. I didn't give you just the time—I can give it. You say on the 12th?

Q. Yes. A. That is, T. P. No. 1.

Q. Yes. A. 9:49 A. M. [151—25]

Q. And what were your measurements there?

A. Approximately four feet.

Q. You approximate it—did you measure it?

A. Not with a tape-line, no.

Q. How did you approximate it?

A. Judging by the distance between the piling.

Q. You didn't get off the boat and take any measurements?

A. I don't remember that I landed on that trap.

Q. Now, do you know how long those pull-back sticks are on No. 1?

A. I didn't measure it.

Q. You don't know how long it is. What would you say about that—you are pretty good on estimating—what was that?

A. I would say approximately twenty-four feet—might be five feet more or five feet less, because if

(Testimony of Ernest P. Walker.)

you measure below the lashing—do you mean below the short shove-down?

Q. Yes, the long shove-down runs from the top of the trap down to the bottom of the ocean, doesn't it?

A. Supposed to.

Q. I mean the pull-back or closing stick; you don't know only by guess how long that was?

A. I have measured from the top of the capping to the lashing on some of them.

Q. On this particular one?

A. It will not exceed thirty feet.

Q. That is your judgment?

A. You are asking me for my judgment.

Q. I say you didn't measure it?

A. Not actual measurement, no.

Q. What about the other side of the trap—the heart? A. Practically the same.

Q. Pull-back stick about thirty feet long?

A. I said not to exceed thirty feet. [152—26]

Q. How wide open was that at the widest part on the other side of the heart?

A. I didn't say how wide it was. At the water level it was about four feet.

Q. How wide was it at the widest part?

A. I would judge it to be about ten to twelve.

Q. That is your judgment?

A. I didn't measure it right at the level of the capping; that is, above high tide.

Q. Now, then, at the water level how was it?

A. I said about four feet wide.

Q. That was at 9:45 in the morning? A. Yes.

(Testimony of Ernest P. Walker.)

Q. When did you reach the next trap?

A. Number two followed, or no, trap—T. P. No. 2 was reached before. You see, they are arranged in the reverse order.

Q. I see. What time did you reach that trap No. 2 in this indictment No. 1034? That is what I am asking about. When were you there?

A. That is, on July 12th?

Q. Yes, on the 12th. A. That was 9:44 A. M.

Q. How far are those traps apart?

A. They were a little over 1800 feet. They are about five minutes run almost straight through.

Q. You reached that about 9:44 and then you went, you say, down to trap No. 1 and got there about 9:49? A. Yes.

Q. Now, did this trap No. 2 have the same sort of closing or pull-back stick? A. It did. [153—27]

Q. Same kind? A. Yes.

Q. Your judgment is, about the same length?

A. Yes, approximately so.

Q. How wide did you say that it was open at the water's edge and pull-back? A. About eight feet.

Q. The opening is in somewhat of a V-shape?

A. Yes, running from eight feet at the water's level; it is nothing at the lashing, which was about twenty-four feet below the capping, or approximately that.

Q. What was it on the other side, approximately?

A. Approximately the same.

Q. The same sort of a pull-back? A. Yes.

Q. Now, what was the next trap you went to, No.

(Testimony of Ernest P. Walker.)

3, or did that come in a different order?

A. You are taking them from one to three in the indictment?

Q. Yes, I will take count three in this indictment. That is the way they were testified to by you on direct examination and I want to take them in the same order.

A. That was visited at 9:15 A. M.

Q. 10:15 A. M.? A. 9:15.

Q. You reached that before you did trap No. 2?

A. Yes.

Q. And that had the same sort of a closing or pull-back stick?

A. Yes, approximately the same.

Q. Approximately the same kind. Did you notice how wide it was at the water's edge on both sides?

A. One of them was about eighteen inches and the other about two feet. [154—28]

Q. Was anything wrong with the pot of that?

A. With the pot of that trap?

Q. Not the pot—the tunnel entering the pot. No, I will withdraw that question. You haven't testified anything in there about the tunnel that leads into the pot. Now, when were you at T. P. Co. No. 4? A. That was 9 A. M.

Q. Now, what did you find there at the water level?

A. It was not open back the required twenty-five feet.

Q. I said how was it at the water's edge?

A. I don't have the exact distance.

(Testimony of Ernest P. Walker.)

Q. How about the pull-back stick?

A. The same generally.

Q. As to the other traps—did you get off at any of these traps and make measurements?

A. Not on this.

Q. Not on this list you have just testified about?

A. No, not those I have just testified about.

Q. And your distances are estimates?

A. They are close estimates.

Q. Now, on T. P. Co. No. 5; what time were you there? A. 8:45 A. M.

Q. That had the same sort of pull-back sticks or closing poles? A. Yes, approximately the same.

Q. How wide did you find them open at the bottom in the heart?

A. Not to exceed five feet—probably much less.

Q. That was another estimate you made, was it? You didn't get out and measure it?

A. No, I didn't measure it.

Q. Now, the next one is in count 6—T. P. Co. No. 6—what time were you there?

A. That was about 7:45 A. M. [155—29]

Q. The same sort of pull-back closing sticks as the other traps? A. Yes.

Q. You made your estimates there—you didn't make any measurements?

A. Not any actual measurements—between one and three feet; that is, one was about one foot and the other three feet.

Q. At the water's edge? A. Yes.

Q. Both of those you estimated?

(Testimony of Ernest P. Walker.)

A. Yes, close estimates.

Q. Now, let us take the other one, 1035-B; contains two counts; when did you reach that trap—T. P. Co. No. 11? A. 9:20 P. M.

Q. You found the same sort of pull-back sticks or closing sticks in the heart?

A. Yes, approximately the same.

Q. What did you find at the water level on either or both sides of the heart in that case?

A. Only a comparatively slight opening; that is, not to exceed ten feet.

Q. You estimated that, did you?

A. Yes—that is, estimates—I measured by the eye, judging the distance between the piles.

Q. Of course, you couldn't estimate it any other way than by the eye?

A. No, judging by the distance between the piles.

Q. Did you measure any distances between the piles? A. I have.

Q. In all of these traps?

A. I have measured it on No. 11.

Q. Did you measure it on any of the rest of them?

A. I have measured it on traps of another company. [156—30]

Q. I don't care about another company.

A. No other trap of this company.

Q. On trap No. 11 you actually measured?

A. Yes, I measured.

Q. And then you judged these other distances by having measured the distance between the piles?

A. Yes, other traps.

(Testimony of Ernest P. Walker.)

Q. When did you measure that on No. 11?

A. I believe that was the morning of August 10th.

Q. Was that the time you went out there to make an investigation to see how—

A. That was returning from the trip, after the regular patrol was over.

Q. After it was over?

A. After the closed period was over.

Q. After the closed period was over you made these measurements? A. Yes.

Q. Had you made any measurements of this defendant company's traps between the piles until you got the information for all these indictments?

A. I said approximately ten feet.

Q. I asked you if you did that before?

A. No, I said I knew they were.

Q. What time did you say you visited that trap, No. 11? A. You mean that Monday morning?

Q. I mean to go back there to take the picture the next day.

A. I returned by there Monday morning. You will notice that Saturday evening I was there—it wasn't the next day.

Q. You were there Saturday evening and then went back Monday morning?

A. Returned back there Monday morning. [157—31]

Q. That is the time you took the photographs you showed to the jury? A. Yes.

Q. Was anybody out there on the trap at the time you took the photograph? A. No, sir.

Q. Did you see a watchman out there?

(Testimony of Ernest P. Walker.)

A. The watchman came out while we were about it.

Q. You saw him there? A. Yes.

Q. The trap hadn't been prepared for fishing?

A. He had pulled the tunnel into fishing position.

Q. And you swear that the other parts of the trap remained the same as they were when you were there on the previous times?

A. Approximately the same.

Q. What do you mean by approximately?

A. They hadn't been moved five feet.

Q. They had been moved some?

A. I do not know that they had been moved any.

Q. You say approximately—you mean they would be within five feet as they were on the previous times?

A. They were not closed more than five feet more than they had been.

Q. Then you took this picture when it had been closed fully five feet? A. No, I didn't say that.

Q. Approximately five?

A. No, I didn't say that; I said it had not been closed more than five feet. I don't know that it had been closed an inch.

Q. I say that was the condition it was in when you took the photograph? [158—32]

A. That condition is when I took the picture.

Q. That is the time you say it hadn't been closed any more than five feet from the time you saw it before?

A. Yes, it had not been closed more than that; I didn't say it had been touched. The watchman indicated that it had not.

(Testimony of Ernest P. Walker.)

Q. Do you say it was in the same condition, that it had been changed some?

A. I didn't say it had; I didn't say the heart walls had been touched.

Q. What do you say?

A. I said it had not more than that—you tried to get me to say that it had.

Q. That is the time you took your picture when you say that it hadn't been closed more than five feet—the time you took the photograph? A. Yes.

Q. And there had been some change made in it between the time you saw it and the time you took the photograph?

A. I didn't say any change had been made in the heart walls at all.

Q. What do you say?

A. I said they had not been closed more than that; I didn't say that it had been closed an inch. From what the watchman said, I don't think they had touched them. I said, took the tunnel out.

Q. You didn't take that in the photograph?

A. It shows in the picture.

Q. The part marked X doesn't show that.

A. I was inside the heart looking through the tunnel into the pot.

Q. When did you visit trap No. 12, count No. 2?

A. I was there at 8:40 P. M. [159—33]

Q. The same day?

A. July 11th—no, that was August.

Q. What was the distance between those two traps? A. The distance between those two?

(Testimony of Ernest P. Walker.)

Q. Yes. A. I don't know just how far it is.

Q. Approximately?

A. It must be—I don't remember the exact position—I didn't pay any attention to the navigation of it. That is, I don't pay any attention to the navigation at all.

Q. I mean how long did you travel between the two?

A. I don't remember just how long it takes between the two.

Q. Do you know when you reached trap No. 12?

A. I don't know—this note of 8:40 was when we reached—it was probably just when we reached it.

Q. Did you measure it?

A. Yes, we were out on top—we didn't make a measurement with a tape.

Q. Your distances there were based on estimates?

A. Yes.

Q. And how do you say the closing poles of that trap were? How wide was the space on the water level?

A. Why, that was not to exceed ten feet there. The shove-downs were just barely under water, about six inches on top of them and the angle they were it was approximately ten feet.

Q. That is an estimate?

A. Yes. Before you reached the first pile out—I would call that ten feet, granting it was a ten-foot pile.

Q. It was not actual measurement?

A. Not actual measurement, no.

(Testimony of Ernest P. Walker.)

Q. Now, let us go into 1036-B—the time alleged there was on the 9th of August. What time of day were you there, did you [160—34] say—the T. P. Co.'s No. 1?

A. You want them taken up “one, two, three”?

Q. That is the way you testified, Mr. Walker.

A. T. P. No. 1?

Q. Yes. A. I was at T. P. No. 1 at 6:45 A. M.

Q. You didn't make any measurements there?

A. Not with a tape-line.

Q. You didn't get off the boat? A. No.

Q. What did you find the distance of that V-shape was at the water level?

A. Each heart wall approximately five feet at the water level?

Q. Approximately the same sort of pull-back sticks that there were in the others?

A. Yes; that was high tide, or rather high.

Q. I mean the same sort of pull-back sticks; I didn't ask you about the time. A. Yes.

Q. When did you reach trap No. 2, count 2 in the indictment 1036-B?

A. I don't know anything about the indictment number; what was the date of the trap?

Q. Same date. A. That is, on the ninth?

Q. Yes, ninth of August, No. 2.

A. That was 6:40 A. M.

Q. What was the distance between that trap and the last trap you were at?

A. Slightly over 1800 feet—five minute-run.

Q. Your measurements there were estimated and

(Testimony of Ernest P. Walker.)

you didn't make actual measurements? [161—35]

A. Not actual measurement, no.

Q. What did you find the condition was at the water level?

A. The heart walls there were about five feet. That is, about half the distance between those piles, which are approximately ten.

Q. The next one is on the same date and is trap No. 3. What time did you arrive there on that date?

A. 6 A. M.

Q. What is the distance between that trap and the one you just examined previously?

A. What is the distance, you say?

Q. Yes. A. I don't know exactly.

Q. Approximately?

A. About four traps occurred between there; that would be four times a little over 1,800 feet; that was approximately a straight run from 6 A. M. to 6:40.

Q. What did you find about the pull-back sticks and the heart at the water level—approximately the distance? A. About eight feet.

Q. You estimated that? A. Yes.

Q. What time did you arrive at T. P. Co.'s No. 3-A on the same date?

A. 5:55—five minutes before.

Q. What condition did you find the opening between the pull-back stick and the pile in the pot; that is, the distance?

A. That was about ten feet—not to exceed that.

Q. What time did you say you got there?

A. 5:55 A. M.

(Testimony of Ernest P. Walker.)

Q. What time did you get to T. P. Co.'s No. 4 on the same date?

A. That was about 5:52. [162—36]

Q. What did you find about the pull-back sticks there at the water level, the distance between that and the nearest pile in the pot?

A. One was about three feet and the other about five.

Q. You estimated those? A. Yes.

Q. What time did you say you got there?

A. 5:52.

Q. How far was that from the other trap you just examined previously?

A. It was supposed to be 1,800 feet; it may be a little closer than that. The difference in time would indicate that it might be a few feet closer. I might have been a minute away before I noticed the time.

Q. Now, No. 6 on the same date, the same company. Do you remember the time?

A. 5:11 A. M.

Q. What was the distance between the pull-back stick and the nearest pile in the pot at the water level?

A. Approximately ten feet at the water level.

Q. Now, then, count 7, we have T. P. Co.'s No. 9; when were you there? A. That was 4:27 to 4:35.

Q. And what was the condition of the opening at the water level between the pull-back stick and the nearest pile in the pot?

A. One was about two feet and the other about four feet. I landed there.

(Testimony of Ernest P. Walker.)

Mr. WINN.—That is all.

The COURT.—Any redirect examination?

Mr. REAGAN.—I omitted on direct examination to ask where each of these traps was situated. I would like to have permission to do that now. There are some waters that are excepted, [163—37] and I want to show that these are not in those waters.

Redirect Examination.

(By Mr. REAGAN.)

Q. Will you tell where each of these traps is situated?

Mr. WINN.—We object on the ground that it is irrelevant, incompetent and immaterial, and it is not alleged in the indictment whether they were in the open waters, waters excepted by the statute, and it is an absolute and material allegation, and we will show that in all these indictments you have to mention that they are not in the excepted waters. You have to make that or if you don't the indictment is fatally bad. He cannot prove it, because it was not alleged, and I will state to the Court now that that is one of our main points against the indictment.

The COURT.—Just a moment; the jury is excused until two o'clock. You can argue that point at 1:30 o'clock. (Whereupon the jury was admonished and court adjourned until 1:30 P. M. the same day, when court reconvened pursuant to adjournment. From 1:30 P. M. till 3 P. M., argument while jury was out of courtroom. At three o'clock the jury was called and all being present, the Court again admonished the jury and excused them until 10 o'clock A. M., Oc-

(Testimony of Ernest P. Walker.)

tober 29, 1914. After the jury had retired, counsel resumed argument, after which Court adjourned until 10 o'clock A. M., October 29, 1914, when court reconvened pursuant to adjournment, at which time the clerk called the jury and all answered present.)

The COURT.—The objection to the question will be overruled. I have made an examination of the authorities and considered the arguments made yesterday, but I don't see any reason for changing the rulings I made at the time they [164—38] were raised or suggested on demurrer or motions to strike.

ERNEST P. WALKER, a witness called and sworn by the plaintiff, being recalled for further re-direct examination, testified as follows:

Mr. WINN.—I would like to ask the witness a few questions on cross-examination. This is in the nature of a new question.

The COURT.—Very well.

Cross-examination.

(By Mr. WINN.)

Q. Mr. Walker, how many of these traps that are enumerated in these three indictments are double-hearted? A. What is the question?

Q. How many of these traps that are enumerated in these indictments, traps which I questioned you about yesterday, are double-hearted?

A. I do not remember the number.

Q. Are any of them?

A. I do not recollect that.

Q. You know what a double-hearted trap is, don't you? A. Certainly.

(Testimony of Ernest P. Walker.)

Q. How wide was the entrance to the heart of the trap, where the lead intersects the heart?

A. On each side of the lead it will be approximately ten feet, maybe a little over, maybe a little less.

Q. How do you know it would be approximately when you answered the question that you didn't know whether it was single-hearted or double-hearted?

A. What does that have to do with whether it was double-hearted? [165—39]

Q. Do you say that these traps would be fifteen feet on either side of the lead? Now the lead—if it has two entrances, it is to lead—(indicating).

A. There are two different terms used for double-hearts.

Q. I refer to a trap like that *were* there are—

A. If you choose to call that a double-heart—there is also a term double-heart—

Q. What do you mean?

A. There is one double-heart with an apex—one is entering the apex of the other; that is also used.

Q. There are two hearts in that kind of a trap before they reach a pot of the kind—

A. They go through two hearts.

Q. Are any of these traps traps of that nature?

A. I don't know; I don't remember.

Q. How many have double entrances with intersected hearts?

A. I don't remember; I didn't pay any attention to that—I didn't care about it.

(Testimony of Ernest P. Walker.)

Q. What was the size of the opening of these hearts where the lead intersects it?

A. They will average about ten feet, maybe a little more, maybe a little less. I didn't care about that, so I didn't pay any particular attention to it.

Q. You didn't pay any particular attention to that part of it? A. I didn't have any occasion to.

Q. Do you know the size of the pots of these traps that are enumerated in the indictment?

A. They are constructed approximately forty by forty.

Q. You didn't know these traps sufficiently well to tell this jury whether or not any of these traps are constructed like the model—that is, whether they had an entrance on both [166—40] sides of the lead or only on one side?

A. It doesn't necessarily apply to any particular trap—it is general.

Q. You didn't notice these traps in these indictments sufficiently well to tell this jury as to whether or not there were two entrances at the intersection of the heart?

A. Some of them have two. I don't remember which had one and which had two.

Q. Would you swear that any of them have two entrances?

A. I know some of them have, but I can't recollect the ones.

Q. You say the average trap has an entrance on either side of the heart of fifteen feet; that is, speaking generally—not speaking of these traps?

(Testimony of Ernest P. Walker.)

A. They would be approximately that. I have entered with a rowboat and entered that way.

Mr. WINN.—That is all.

The COURT.—Have you any redirect examination on that?

Mr. REAGAN.—No, sir.

The COURT.—Let the record show that Mr. Walker is recalled for further redirect examination.

Redirect Examinaiton.

(By Mr. REAGAN.)

Q. Mr. Walker, will you state where these traps are situated that you have testified to here?

Mr. WINN.—We object to the question for the reason that it is incompetent, irrelevant, and immaterial, on the charges made in the indictment, and that, insomuch as they haven't set forth in these indictments that these [167—41] traps were not in the open waters or open fields, where they can be fished at any and all times and all seasons, that the question cannot be answered for that reason. They haven't properly pleaded so as to show where they are.

The COURT.—The objection will be overruled.

A. In the First Division of Alaska.

Q. (By Mr. REAGAN.) In what waters?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

A. The waters of Icy Straits and Chatham Straits—in that district.

Q. (By Mr. REAGAN.) Section eleven of the Act under which this prosecution is had, provides

(Testimony of Ernest P. Walker.)

that the Secretary of Commerce and Labor is authorized to make and establish such rules and regulations, not inconsistent with the law, that may be necessary to carry into effect the provisions of the Act. Do you know whether or not the secretary has made any regulations in regard to fish-traps? A. He has.

Q. Will you state whether he has made any regulations or ruling in regard to the marking of traps?

Mr. WINN.—I object on the ground that it is not the best evidence.

The COURT.—This question is whether he has.

A. He has.

Q. (By Mr. REAGAN.) Will you state whether the traps are marked? A. They are.

Q. How are the traps of this defendant company marked?

A. T. P. Co., then follows the number.

Q. Number 1, 2, 3, 4, etc.? A. Yes. [168—42]

Q. Have you testified to any traps that do not belong to this company in this examination?

A. I have not.

Q. Will you state what these traps are, these contrivances that this defendant maintains in the waters of Icy Straits?

Mr. WINN.—I object to the question as incompetent, irrelevant and immaterial under the pleadings. If he has got to show what kind of traps these are, it comes within the argument we made yesterday. That is a material part of the indictment, and if it isn't, this question would be immaterial, and, in-somuch as it is not alleged what kind of traps they

(Testimony of Ernest P. Walker.)

are, the question is incompetent, irrelevant and immaterial under the indictment.

Mr. REAGAN.—I have alleged that they are fish-traps; I want to prove it.

The COURT.—Objection overruled.

A. They are trap-nets or fish-traps.

Q. (By Mr. REAGAN.) What is the fact as to whether they are stationary or floating traps?

A. They are stationary.

Q. Did you measure any of the piles of these traps at the outer limit of the heart close to the pot to find out their length from the capping to the ocean bed?

A. I did.

Q. Will you state what the measurement was that you ascertained?

Mr. WINN.—I object to the question as not being proper. I think this was covered; he stated he made only one measurement. If these indictments were found on one trap and that—

The COURT.—Read the question. [169—43]

(Q. read by stenographer:) Will you state what the measurement was that you ascertained?

The COURT.—Do you mean the measurement of the opening?

Mr. REAGAN.—The measurement of the piles. I want to know the length of the piles up and down.

The COURT.—Objection overruled.

Mr. WINN.—What piles?

Mr. REAGAN.—Pile of the heart close to the pot of one of these traps.

The COURT.—Which one of the traps?

(Testimony of Ernest P. Walker.)

Q. (By Mr. REGAN.) Which trap did you measure? A. No. 11.

Q. What was the length of the pile?

A. Seventy feet.

Q. Do you know from your measurement of that pile and your observation of the other traps approximately the length of the pilings, of the other pilings at that point in the trap?

A. They are approximately the same.

Q. The same—about seventy feet?

A. About that.

Q. How far, if you know, from the capping down is the short shove-down attached to the long shove-down of these traps, generally?

Mr. WINN.—He already testified to that yesterday. I repeated it and I went over it on each trap. He testified that in his judgment it was about thirty feet.

Q. (By Mr. REAGAN.) Is that correct?

A. In one instance it is twenty-four feet; I said it did not exceed thirty feet.

Q. Now, have you made a sufficient observation of the traps in question in these indictments, from which you can illustrate [170—44] to the jury how these traps operated from this illustration here?

A. I can.

Q. I wish you would step down here and illustrate how these traps operated.

Mr. WINN.—I object on the ground that it is irrelevant, incompetent and immaterial, and it is going over the direct examination he had with the wit-

(Testimony of Ernest P. Walker.)

ness before. This would-be model—we objected to the witness testifying to it. The proper foundation hasn't been laid.

The COURT.—He hasn't been qualified?

Mr. WINN.—He hasn't been qualified to testify to the construction of the trap. It is not shown to be authenticated.

The COURT.—I think you ought to qualify him a little more.

Mr. WINN.—I beg the Court's pardon, but I understood when counsel—I want to understand at this time whether we are going to enter on direct examination on the whole case and go over that this morning.

The COURT.—I understood that myself, but if he wants to recall him on something else, he may do so.

Q. (By Mr. REAGAN.) Mr. Walker, are you familiar with the defendant company's traps about which you have testified that are mentioned in these indictments sufficiently to explain their construction?

A. Yes.

Q. Will you state whether or not this exhibit for illustration is, generally, in its make-up, of such character that would aid you in illustrating the construction of these traps to the jury?

A. It is. [171—45]

Q. And all of the traps mentioned in the indictment? A. It is.

Q. Will you state who caused this trap—this illustration to be made? It was made under your

(Testimony of Ernest P. Walker.)

supervision, was it? A. It was.

Q. For the purpose of illustrating the traps in this case? A. Yes, sir.

Mr. REAGAN.—I ask permission of the Court to use this trap for the purpose of illustrating fish-traps.

The COURT.—Do you mean fish-traps in general, or fish-traps mentioned in this case?

Mr. REAGAN.—The fish-traps mentioned in this case only.

The COURT.—He hasn't testified that that is a correct representation of the fish-traps in this case.

Mr. REAGAN.—Yes; that is just what I asked him.

The COURT.—He can't testify to it unless he testifies now that that generally is a representation of the fish-traps in question. He may have made it for that purpose, but unless it is—

Q. (By Mr. REAGAN.) Will you answer whether or not this is a general representation of the fish-traps in these cases? A. It is.

Q. In all essential particulars? A. It is.

Mr. REAGAN.—I now ask leave.

The COURT.—Any objection?

Mr. WINN.—He hasn't testified—

The COURT.—Yes, he has.

Q. (By Mr. REAGAN.) Will you tell us how the fish-traps about which you have testified, mentioned in these indictments, are constructed? [172—46]

Mr. WINN.—I object on the ground that it is irrelevant, incompetent and immaterial under the allega-

(Testimony of Ernest P. Walker.)

tions in the indictments, and that there is no foundation for the question, and that this witness has already shown on cross-examination all he knows about fish-traps and fishing, and I submit that that being before the Court shows that this witness is absolutely incompetent to testify in regard to fish-traps.

The COURT.—Objection overruled.

Q. (By Mr. REAGAN.) Will you state what this represents? (Indicating.)

A. This represents the lead.

Q. Where is a fish-trap—any of these fish-traps we have been talking about?

A. The lead stretches from the shore to the heart.

Q. About what distance?

A. That may vary from a hundred feet to a mile.

Q. It is made with piling, is it?

Mr. WINN.—I object to the question. Let him testify about the traps contained in the indictments.

The COURT.—He is asking the witness what the lead of a fish-trap is.

Mr. WINN.—What difference does it make when it is in somebody else's traps?

The COURT.—What difference does it make in this case whether it is in this case or something else?

Q. (By Mr. REAGAN). These represent piles? (Indicating.)

A. Yes.

Q. This is the netting—stretching the whole length, does it? A. Yes.

Q. What does this represent? [173—47]

A. The heart.

(Testimony of Ernest P. Walker.)

Q. Does this represent the distance the lead enters into the heart? A. Yes, approximately so.

Q. Will you state how the fish get into the heart?

A. Being stopped by the lead, they cannot go upon the land, so they move towards deep water, entering through one or both openings, as the case may be.

Q. Something similar to a rat-trap? A. Yes.

Q. Will you state when the fish are caught?

Mr. WINN.—I object on the ground that no foundation has been laid for the question. He has never caught a fish.

The COURT.—You will have to show that he knows how they are caught—knows how fish-traps operate.

Q. (By Mr. REAGAN.) Have you seen fish caught in traps? A. I have.

Q. Will you state how they are caught?

Mr. WINN.—I object on the ground that it calls for a conclusion.

The COURT.—Ask him what happens to the fish after it gets into the heart. Can he get out again?

A. It cannot escape, ordinarily.

Q. (By Mr. REAGAN.) It is then substantially caught? A. Practically caught.

Q. What happens to it? What is this part here?

A. That is the tunnel.

Q. What is it made of?

A. Webbing or netting—wire netting in some cases—the same shape. [174—48]

Q. This portion here; what is this called?

A. The pot.

(Testimony of Ernest P. Walker.)

Q. This portion? A. Spiller.

Q. What is this little thing here?

A. That is the other tunnel, leading to the spiller.

Q. From the pot to the spiller? A. Yes.

Q. What is the function of the spiller?

A. Practically a reservoir.

Q. As to unloading fish from a trap, what is its function?

A. The fish are taken from it, from the spiller, into boats or scows.

Q. After fish are in the heart and this tunnel is in working order, open, what is the next happening?

Mr. WINN.—Same objection to all these questions on account of the incompetency of the witness and no foundation laid to answer the questions.

The COURT.—Same ruling.

A. The fish enter the pot.

Q. (By Mr. REAGAN.) If this tunnel is open and in working order, what happens as to the fish after they get into the pot?

A. They will finally work into the spiller.

Q. What does this represent? (Indicating.)

Mr. WINN.—Object to it as already having been covered.

Mr. REAGAN.—It hasn't been illustrated—I am illustrating.

The COURT.—Objection overruled.

A. The long shove-down.

Q. (By Mr. REAGAN.) And this? (Indicating.) [175—49]

A. The short shove-down.

(Testimony of Ernest P. Walker.)

Q. Will you state how the webbing was on the traps that you saw on each of the occasions that you have testified to here?

Mr. WINN.—I object to it.

The COURT.—I don't know whether you intend to go over the whole thing again or what you are doing.

Mr. REAGAN.—I want to illustrate how it is fastened.

Mr. WINN.—Did the same thing yesterday.

Mr. REAGAN.—The trap hasn't been used for that.

Q. Is this the way it is when opened?

Mr. WINN.—Same objection.

A. It is.

Mr. REAGAN.—That is all.

Recross-examination.

(By Mr. WINN.)

Q. You say this thing here you have testified concerning represents the construction of the fish-traps that are enumerated in these indictments, do you?

A. Essentially so.

Q. Essentially so. Did you ever see a fish-trap in your life that was constructed—that had the bottom of the pot approximately on a level with the bottom of the heart?

A. You will notice there is a break that shows it is not.

Q. Answer the question. Did you ever see a fish-trap in your life that had the bottom of its pot approximately on a level with the bottom of the sea or bottom of the heart? A. No.

(Testimony of Ernest P. Walker.)

Q. This is approximately so, isn't it? (Indicating.) [176—50]

A. You will notice by the model that the webbing on the heart goes lower; there is a break here under the pot and spiller; that break may be an indefinite distance.

Q. Do you know the depth of the pots of this company's traps? A. Approximately forty feet.

Q. And how long did you say these other pilings were? A. Seventy.

Q. Then there could—the bottom of the pot couldn't be on the bottom of the sea like this here?

A. The bottom of the pot is not.

Q. That couldn't be? A. No.

Q. By at least thirty or forty feet if these piles next to the port are seventy feet long? A. Yes.

Q. Now, then, you have constructed this model or it was constructed under your care and shows a double entrance?

A. It can be made to be either one or two; you will notice it has an arrangement for both.

Q. You don't know how many of these traps of the defendant company have double-hearts and when I say double-heart I mean a double entrance?

A. No, I don't remember.

Q. You don't know how wide the entrance to the heart from the lead is in any of these traps of the defendant company?

A. I wouldn't say; I wouldn't know.

Q. Did you ever measure any of them?

A. Not actual measurement.

(Testimony of Ernest P. Walker.)

Q. You just guessed at them?

A. I estimated because I had been through with a rowboat.

Q. You guessed at it? [177—51]

A. I don't consider it a guess there.

Q. What? A. I told you, no.

Q. How many hearts of the traps of the defendant company did you enter with a rowboat?

A. One or two.

Q. What numbers were they?

A. No. 11, I remember distinctly.

Q. When did you do that?

A. That was on the morning—the same morning I took the pictures.

Q. That was before the indictments? A. Yes.

Q. Is No. 11 double or single-hearted in the meaning I have referred to about the entrance at the lead?

A. Single, if I remember rightly.

Q. Would you be positive—you are pretty good at estimating—I want you to be positive whether No. 11 has a double or single-heart entrance?

A. I am quite sure it has only an entrance on the right-hand side; that is, the lower side—that it only fishes from one side of the lead.

Q. You went through that with a rowboat, and still you will not testify to that positively, whether it had a double or single entrance?

A. I went through by the one side.

Q. I say you were out there and entered the heart with a rowboat, but will not swear to the jury positively that there was one or two entrances to the heart?

(Testimony of Ernest P. Walker.)

A. Let me think a moment as to what I remember about that. It has only one entrance.

Q. How wide is it? [178—52]

A. Between ten and fifteen feet.

Q. You are positive of that, that it has only one entrance—after you have thought it over?

A. I am quite sure of that.

Q. Are you positive? A. Yes.

Q. You are positive? A. Yes.

Q. What is the width of it?

A. What is the width of it?

Q. Yes.

A. I said between ten and fifteen feet, I would judge.

Q. Can you jog your memory a little further and tell me as to how many of these traps included in these indictments have double-entrances?

A. I didn't pay any attention to that—it didn't concern me as to that.

Q. It didn't concern you as to that?

A. It didn't make any difference to me.

Q. You testified a while ago that you considered that fish were caught when they got into the heart?

A. Practically caught.

Q. Wouldn't it concern you as to whether or not they were caught—you testify to the entrance of the heart, to the lead—wouldn't you take that into consideration? A. I don't see your point.

Q. You say that the fish are practically caught, in your judgment, when they enter the heart?

A. Yes.

(Testimony of Ernest P. Walker.)

Q. Now, as to whether or not they were caught, wouldn't it depend upon the width of the entrance to the heart? [179—53]

A. A trap would not be effective if it were so lashed to allow them to escape back in any considerable quantities.

Q. If they have double entrances, there would be thirty feet?

A. There might be twenty to thirty. I said also that it might be less than ten.

Q. You are going to modify it again, are you?

A. I said it would not exceed fifteen—I said approximately ten.

Q. Give me your best judgment of the width.

A. I said about ten.

Q. Going to cut out the fifteen?

A. It may be as much as fifteen in some of them.

Q. You say they range between ten and fifteen?

A. I say approximately ten and maybe as much as fifteen in some.

Q. Those some you can't state to this jury whether they were the particular traps in this case?

A. Particular traps in what case?

Q. This case? A. No. I can't.

Q. In any event, in double entrances you would have between ten and twenty feet of opening in there, wouldn't you? A. Yes.

Q. And if there is only one opening and that is ten or fifteen feet, it would be ten or fifteen feet?

A. It could be if there was only one.

Q. Your contention is that they just herd each

(Testimony of Ernest P. Walker.)

other and make no effort to get out of it when they get in the heart?

A. They work towards deep water.

Q. Don't they ever work back towards the place of entrance?

A. There would be no object in working towards shallow water.

Q. Will you swear that they don't work around in there and try every effort to get out?

A. They are so constructed that they turn in each one and swing. [180—54]

Q. How many times did you ever watch one of these fish-traps fish? A. Several times.

Q. When—how—where?

A. Do you want the exact dates?

Q. Yes.

A. On the—I believe the tenth of June.

Q. What trap did you watch on the 10th of June?

A. On Heceta Island, West Coast of Prince of Wales Island.

Q. A trap of this company?

A. Not of this company—a similarly constructed trap.

Q. Will you confine your testimony to the traps of this company? How many times did you watch traps of this company fish? A. Twice.

Q. When?

A. On the evening—it was No. 12, then No. 11 the same evening.

Q. How long did you watch them?

A. I should judge that I watched No. 12 fifteen

(Testimony of Ernest P. Walker.)

minutes, seeing fish coming in, and No. 11 perhaps—over ten or fifteen—something like that.

Q. Were these the only times you have watched fish-traps fish?

A. Of this particular company. They all operate essentially the same.

Q. Was there any watchman on the trap at the time you watched them? A. No.

Q. Anybody there?

A. On the No. 12 Mr. Neville and Mr. Ward came up and watched the fish with me.

Q. Those two boys you took out with you?

A. Captain and engineer of the boat. [181—55]

Q. That is the only time you ever watched? You say—I want to know—that it doesn't matter whether this opening is fifteen, ten, twenty, or thirty feet to the heart, that in your judgment you consider the fish practically caught when in the heart?

A. Owing to the shape.

Q. I don't care for that; answer the question.

A. They are practically caught when in the heart.

Q. And that opening has nothing to do with the fish escaping at all? The fish don't escape there; is that what you want the jury to understand, that they wouldn't escape?

A. Some fish may, but the way it is constructed they do not, or at least not in great quantities.

Q. You arrive at that by examining traps about fifteen minutes? A. No, not by that.

Q. How many times have you ever watched any other traps?

(Testimony of Ernest P. Walker.)

A. Your company has arrived at that conclusion, that they don't escape in any great quantities.

Q. I am not asking about my company. How many traps have you ever examined?

A. How many others?

Q. Yes.

A. You mean watched them fish?

Q. I mean how many you have ever watched fish. Give me the times and how.

A. As I told you, it may be the tenth of June, on the south end of Heceta Island.

Q. How long did you watch that fish?

A. That was ten minutes that evening and again the next morning.

Q. How many minutes the next morning did you watch it? A. Just a few moments. [182—56]

Q. When did you ever watch another trap-fish?

A. The Alaska Packers Association.

Q. State when you watched that trap,

A. That was on July 5th.

Q. This year? A. Yes.

Q. How long did you watch that trap-fish?

A. I was around the trap for perhaps half an hour off and on.

Q. When else did you watch a trap-fish?

A. The No. 11 of this company, No. 12 of this company—

Q. You gave that a while ago. Are those the only traps?

A. Then there is the Pacific American Fisheries traps.

(Testimony of Ernest P. Walker.)

Q. When did you watch that and how long?

A. I don't remember the exact date; it was possibly ten or fifteen minutes.

Q. When was that? A. August, I believe.

Q. This year? A. Yes.

Q. Is that all you watched fish?

A. That is all I recall just now. I have been on others and seen them—

Q. Virtually your experience in the fishing business has been this year. You didn't have much last year? A. Not a great deal.

Q. And from that experience you made this examination about the shove-downs and you have described to this jury while you have been on the stand?

A. The times I watched them fish wouldn't count the time I have measured—measuring is additional time—measurements, drawing, photographs is additional time. [183—57]

Q. I mean when on the trap—I don't mean in the office with a lead pencil.

A. I don't mean in the office—I mean on traps.

Q. You made this in town? (Referring to model.)

A. That was part of my drawings and measurements of the traps.

Q. What is this? (Indicating.)

A. That is the pot and spiller, one-half of an inch to a foot, with a contrivance between that piece which is necessary to screw that pipe.

Q. You never did see a trap that had the regular-

(Testimony of Ernest P. Walker.)

ity of piles as this?

A. Some of them are sawed off very evenly.

Q. I mean regularity of the distance between them?

A. That varies somewhat; I think if you measure some of them you will find a similar variation.

Q. You never did see any trap that had the variation between the piles of the heart like this?

A. That doesn't have absolute regularity; you see, one-half an inch represents a foot.

Q. If the fish are practically caught when in the heart, what is this pot for?

A. That is practically a reservoir.

Q. And what is the next place?

A. The spiller is still another reservoir.

Q. And each one of them has an entrance—the first one, the pot, has an entrance from the heart through a tunnel. About what is the width of the tunnel at the point where it leads into the pot from the heart; what is approximately the width?

A. That is approximately ten feet.

Q. About how wide is the tunnel at its end, which ends in the pot? [184—58]

A. The spreader bars are about eighteen inches in length between them. It opens slightly more.

Q. What is the width of the entrance from the pot—of the tunnel that leads into the spiller?

A. That is also approximately ten feet.

Q. What is the width of the tunnel that terminates in the spiller?

A. That is about eighteen inches.

(Testimony of Ernest P. Walker.)

Q. Then you would consider a fish just as practically caught in this heart with an opening of twenty to thirty feet as you would when he got out here in the pot or into the spiller?

A. I didn't say that.

Q. You said he was practically caught.

A. Practically so.

Q. Don't you know that the remaining parts of this trap are constructed for the purpose of catching salmon?

A. Still more preventing the possibility of escape.

Q. They would be more apt to escape between a twenty or thirty feet entrance than they would an eighteen-inch entrance to the pot and another eighteen-inch entrance in the spiller?

A. They are practically hopeless from the pot and practically less hopeful after they get into the spiller. They could go back, but the way it is shaped they are not likely to.

Q. I suppose not, because these contrivances are the parts they want to catch the fish in, these two last ones.

A. That, together with the heart.

Q. Did you ever see fish—the action of them in these hearts for any length of time and see them commence shooting through even after they get into the spiller—one fish will shoot through this entrance—did you ever see them go through [185—59] whole schools, right out of the spiller to the pot?

A. I have never seen them do any such thing as that.

(Testimony of Ernest P. Walker.)

Q. Have you ever watched them?

A. I have tried to say if they did I have never seen one.

Q. Where were you when you watched them?

A. When I was on other traps.

Q. That was ten or fifteen minutes that you passed them?

A. I was on them and in some cases I have been in a boat inside of the heart watching them.

Q. The instances you were doing that were the instances you have mentioned to the jury?

A. Yes.

Q. And those brief periods you didn't see any such actions as I have indicated?

A. I didn't see them go back through that way, no.

Q. Where were you?

A. On top of the trap in one instance.

Q. When were you—

A. Other times I was on top of the trap, sometimes in a rowboat.

Q. How many times on top of the trap?

A. The times I have named—you have probably kept track of that.

Q. How many times—three times?

A. Five, I believe I gave you, in addition to the time I was in the heart.

Q. Did you ever during these times you have been there see them shoot out through the tunnel back into the heart? A. I have never seen that.

Q. Did you ever see a fish get out through the

(Testimony of Ernest P. Walker.)

heart—through one of these arrangements from twenty to thirty feet; have you ever seen them get through there? A. No, sir. [186—60]

Q. Never did? A. No, sir.

Q. You weren't watching particularly, were you?

A. I was watching to see all I could about that.

Q. You are not a practical fisherman?

A. What do you mean?

Q. You are not a practical fisherman—you know what that means?

A. I am not engaged in commercial fishing, no.

Mr. WINN.—That is all.

(Witness excused.) [187—61]

[Testimony of Jesse L. Neville, for Plaintiff.]

JESSE L. NEVILLE, a witness called and sworn in behalf of the United States, testified as follows:

Direct Examination.

(By Mr. REAGAN.)

Q. Mr. Neville, will you state your name to the jury, please? A. Jesse L. Neville.

Q. What were you doing during the months of July and August this year?

A. Master on the "Santa Rita" for E. H. Kaser.

Q. What business was the "Santa Rita" engaged in?

A. She was chartered for the U. S. Fish Bureau Commission.

Q. Do you reside in Juneau? A. I do.

Q. How long have you lived there?

A. Three years and a half.

Q. Taking up indictment No. 1034, Mr. Neville,

(Testimony of Jesse L. Neville.)

will you state whether or not you made, between the hours of six o'clock Saturday, July 11th, 1914, and Monday morning, July 13th, 1914, at six o'clock, a trip to the fish-traps belonging to the Thlinket Packing Company? A. I did.

Q. Did you during that trip visit their trap No. 1?

Mr. WINN.—I see the witness is looking at a piece of paper; I would like to know what the paper is.

The COURT.—Yes, you cannot look at a paper unless it is necessary to look at it to refresh your memory. If you can testify without looking at the piece of paper, do so.

A. (By the WITNESS.) I can't testify accurately; we covered [188—62] a good many miles that trip and these notes are for the purpose of refreshing my memory. They were made at the time I was with Mr. Walker.

Q. (By Mr. REAGAN.) You say you can't remember without refreshing your memory from the notes?

A. I can testify, but I can't testify accurately without the notes.

Q. Were those notes made at the time you visited the traps? A. Yes.

Q. Did you put down accurately what you observed? A. I did.

Mr. REAGAN.—I ask that the witness be allowed to refresh his memory from the notes, if the Court please.

The COURT.—Any objection?

(Testimony of Jesse L. Neville.)

Mr. WINN.—Yes, sir, I object to it as being incompetent and immaterial. The witness has testified that he can remember without the notes.

The COURT.—Objection overruled. He says he cannot testify accurately without the notes.

Q. (By Mr. REAGAN.) Now, refresh your memory with the notes and state whether you visited the trap of this company No. 1?

A. I did, at 9:45 A. M., T. P. No. 1.

Q. Did you look at this trap with reference to the heart walls on each side next to the pot?

A. I did.

Q. Will you state what the fact is as to whether or not—what was the fact as to the condition of twenty-five feet of the webbing or net of the heart of that trap on each side next to the pot at that time?

Mr. WINN.—I object. There has been no foundation laid for the witness to answer the question, if the Court please. [189—63]

The COURT.—What further foundation could a man have?

Mr. WINN.—It hasn't been shown that he knows what the heart of a trap is.

The COURT.—It hasn't been shown that he knows one foot from an inch neither—objection overruled.

A. The heart walls on either side were back about three or four feet—not to exceed four feet on either side.

Q. (By Mr. REAGAN.) How far were they so opened?

(Testimony of Jesse L. Neville.)

A. When I say three or four feet, I have reference to the water line at that stage of the tide.

Q. At the water line about three or four feet?

A. About three or four feet.

Q. What date was that—you have given the hour—what date was it?

A. That was on July 12th, 1914.

Q. Did you visit the trap of this defendant company No. 2 on that trip? A. I did.

Q. What date and what hour did you arrive there?

A. July 12th, 1914, at 9:44.

Q. 9:44 A. M.? A. Yes.

Q. Did you look at that trap with reference to its heart walls so that you can tell what condition the heart walls next to the pot were at that time?

A. Yes, they were back about that—

Mr. WINN.—Same objection—no foundation laid.

The COURT.—Same ruling.

Q. (By Mr. REAGAN.) Did you look to observe—to see? A. Yes, I did. [190—64]

Q. What did you find as to whether or not twenty-five feet of the webbing or net of the heart was on each side of the pot?

Mr. WINN.—Object to that as leading.

The COURT.—Objection overruled.

A. They were back not to exceed eight or nine feet.

Q. (By Mr. REAGAN.) Where was that, at the water-line or above the water-line?

A. At the water-line.

(Testimony of Jesse L. Neville.)

Q. You mean to say by that that twenty-five feet was back that far?

A. No; about eight or nine feet of an opening at the water level.

Q. Did you visit the trap of this defendant company on that trip—trap called No. 3?

A. I did—July 12, 1914, at 9:15 A. M.

Q. Did you observe—did you look at and observe the walls of the heart of that trap at each side next to the pot? A. I did.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side next to the pot thereof on that occasion?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

A. There was an opening of about eighteen inches on one side and about two feet on the other.

Mr. WINN.—Q. What do you mean—opening at the water's edge?

A. Yes, at the water's edge.

Q. (By Mr. REAGAN.) Did you on that trip visit the trap of this defendant company No. 4?

A. Yes. [191—65]

Q. Did you look at and observe on that occasion the walls of the heart of that trap on each side next to the pot of the trap? A. Yes.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side next to the pot on that occasion?

Mr. WINN.—Same objection.

The COURT.—Same ruling.

(Testimony of Jesse L. Neville.)

A. Why, the top of the shove-down was back to about the first pile.

Q. (By Mr. REAGAN.) About what distance?

A. Not to exceed eleven feet.

Q. And how much of an opening was there down to the water's edge?

A. I should judge there would be about six feet—might be a foot more or a foot less.

Mr. WINN.—I move to strike out the answer. The witness' judgment is not testimony upon which the defendant may be—

The COURT.—When a witness says “my judgment of a thing,” it means his estimate.

Mr. WINN.—It may be a guess.

The COURT.—No—there is a difference between a guess and an estimate, a very material difference. Objection overruled.

Q. (By Mr. REAGAN.) Did you on that trip visit the trap of this defendant company No. 5?

A. I did.

Q. Did you look at and observe the walls of the heart of that trap situated next to the pot of the trap? Did you observe it? A. I did.

Q. What was the condition as to being raised or lowered of the [192—66] twenty-five feet of webbing or net of the heart of that trap on each side next to the pot?

A. Back about three feet, that much of an opening at the water line.

Q. What time was that—what date and hour was that when you visited trap No. 5?

(Testimony of Jesse L. Neville.)

A. July 12, 1914, at 8:45 A. M.

Mr. MUNLEY.—Q. Will the witness please state the time he visited trap No. 4;—what hour and date he visited trap No. 4? A. 9 A. M.

Q. (By Mr. REAGAN.) July 12th?

A. July 12th, 1914.

Q. Now, as to trap No. 5, did you observe the condition of the tunnel leading into the pot?

A. I did.

Q. What was that condition as to being opened or closed?

A. It was open and Mr. Walker told the watchman to close it.

Mr. WINN.—What is that—I didn't understand the question?

The COURT.—Yes, strike that out. Gentlemen of the jury, don't pay any attention to what Walker told the watchman.

Q. (By Mr. REAGAN.) As to trap No. 4, did you observe the condition of the tunnel leading into the pot of that trap? A. I did.

Q. What was the condition of that tunnel on that occasion with reference to being open or closed?

A. Why, it was open partly.

Q. Did you on that trip visit trap No. 6 of this defendant company? A. Yes, sir. [193—67]

Q. When and what hour?

A. July 12, 1914, 7:45 A. M.

Q. Did you observe the tunnel leading into the pot of that trap? A. Yes.

Q. What was its condition as to being open or

(Testimony of Jesse L. Neville.)

closed? A. It was just partly closed.

Q. Did you look at and observe the walls of the heart of that trap on each side next to the pot?

A. Yes.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side of the pot with reference to being closed or open?

A. There was an opening on one side of about one foot and about two feet on the other side.

Q. Was that at the water level or some other part?

A. All on the water level.

Q. All on the water level?

A. All on the water level, is where I measured.

Q. Now, we will take up the next number, 1035. Will you state whether or not you made a further trip subsequently and visited those traps, and, if so, what date? A. We did, on August 9, 1914.

Mr. WINN.—Q. August 9th?

A. August 8th and 9th.

Q. (By Mr. REAGAN.) Did you on the occasion of that trip visit this defendant company's trap No. 11? A. I did.

Q. At what hour and what date?

A. On the 8th at 9:20 P. M.

Q. August 8th, 9:20 P. M.?

A. Yes. We tied up there for the night. [194—68]

Q. Did you observe—did you look at and observe the walls of that trap next to the pot? A. Yes.

Q. Will you state what was the condition of

(Testimony of Jesse L. Neville.)

twenty-five feet of the webbing or net of the heart of that trap on each side with reference to its being lifted or lowered or otherwise open?

A. It was not lifted or lowered twenty-five feet.

Q. What was its position?

A. Why, I don't remember exactly the distance at the water level there—I was tying up the boat, and I didn't take down the note. I remember looking at it, but I don't remember the exact distance, but the shove-down was not back of the first pile.

Q. How far back was that first pile from the pot?

A. I should judge—say eleven or twelve feet—ten or eleven feet, approximately that.

Q. Did you on the occasion of that trip visit the trap of the defendant company No. 12? A. I did.

Q. Did you look at and observe the walls of the heart of that trap on each side next to the pot?

A. Yes.

Q. What was the condition of twenty-five feet of the webbing or net of the heart on each side with reference to being lifted or lowered or otherwise open?

A. It was not lifted or lowered or otherwise opened twenty-five feet.

Q. What was its condition?

A. One of the shove-downs was lying almost horizontal. If I remember correctly, there was about six inches over the top [195—69] of it; that is, it was on an angle, but it was under water that angle about six inches, I think.

Q. What hour did you arrive at that trap?

(Testimony of Jesse L. Neville.)

A. August 8th, 8:40 P. M., 1914.

Q. That was at the water level?

A. Water level.

Q. What width was the opening at the water level?

A. Not to exceed seven feet, six or seven feet.

Q. Indictment No. 1036. On that same trip did you visit the trap of the defendant company No. 1?

A. I did.

Q. What time and what date?

A. August 9, 1914, at 6:43 A. M.

Q. Did you notice the tunnel of that trap leading into the pot on that occasion? A. Yes.

Q. What was the condition as to being opened or closed?

A. It was open about a foot below the water and above the water.

Q. Did you look at and observe the webbing of the heart on each side next to the pot of that trap?

A. Yes.

Q. What was the condition of twenty-five feet of webbing or netting of the heart on each side of the pot on that occasion?

A. It was pulled back so as to allow an opening at the water level of about three feet on either side.

Q. Did you on that occasion visit trap designated No. 2 of this defendant company? A. Yes.

Q. What date and what hour?

A. On August 9th, 1914, at 6:38 A. M., T. P. No. 2.

Q. 6:38? A. Yes. [196—70]

Q. Did you notice the tunnel of that trap leading

(Testimony of Jesse L. Neville.)

into the pot? A. I did.

Q. What was its condition as to being open or closed on that occasion?

A. About eighteen inches open.

Q. Did you look at and observe the webbing of the heart on each side next to the pot on that occasion? A. I did.

Q. What was the condition of twenty-five feet of the webbing or net of the heart on each side of the pot with reference to being lifted or lowered or otherwise opened?

A. It was pulled back so as to allow an opening of about three feet at the water level.

The COURT.—The question was, “was it lifted or lowered.” A. No, it wasn’t lifted or lowered.

Q. (By Mr. REAGAN.) *In* any of these traps that you have mentioned lifted or lowered?

A. No.

Q. For a distance of twenty-five feet, I mean?

A. No.

Q. Did you on the occasion of that trip visit the trap of this defendant company designated No. 3?

A. No, I don’t have that—my partner was at the wheel then.

Q. You didn’t see No. 3? A. No, not that trap.

Q. Did you on that trip visit the trap of this defendant company designated No. 3—A?

A. No. My partner was at the wheel then.

Q. Did you on that occasion visit the trap of this defendant company No. 4? A. No. [197—71]

Q. Or six? A. No. I was asleep.

(Testimony of Jesse L. Neville.)

Q. Or nine? A. No.

Mr. REAGAN.—That is all.

Cross-examination.

(By Mr. WINN.)

Q. How many times have you been out with this Fish Commission this season?

A. Three times, I think.

Q. On what dates?

A. On the 8th I know once and on July 11th I think was the first trip out, afternoon of July 11th once,—I forgot when we left, six o'clock Saturday evening, Saturday night, I think. The next time was the 8th.

Q. 8th, 11th, and 12th, did you say?

A. No. I said we left Juneau on July 11th.

Q. How long was you out that time?

A. I think we got back on Tuesday or Wednesday. I don't remember what day.

Q. You say July 11th; when was that?

A. That was on Saturday evening.

Q. I am asking you for the correct days?

A. It might have been the 10th.

Q. Do you remember when you left Juneau?

A. I am pretty positive it was July 11th.

Q. You didn't make any memorandum of that?

A. I have it in the log-book; I will get that if you want it.

Q. To the best of your remembrance it was on July 11th?

A. Yes, to the best of my memory. [198—72]

Q. When you left Juneau, Mr. Neville—I am talk-

(Testimony of Jesse L. Neville.)

ing of the time you left with the fish commission—the first time you left Juneau with the fish commission was when?

A. I think, Judge, it was on the 11th of July in the evening; it might possibly have been the 10th. I don't remember without going and looking it up. I can do that.

Q. What time did you return?

A. I think on Tuesday; I am not sure.

Q. What traps did you visit during that trip?

A. There were so many, I don't remember.

Q. Did you visit the traps of this company?

A. Yes.

Q. I wish you would look at the time, from the memoranda you have, and state to me—I will give you the dates. A. All right.

Q. Didn't you testify on direct examination as being July 13th—12th—that you visited—

A. 13th?

Q. Yes.

A. I don't think I said anything about the 13th.

Q. Where were you on July 13th?

A. I don't know.

Q. Where were you on July 12th?

A. I was on the "Santa Rita" somewhere around Chatham Straits.

Q. That is the time you visited some of the company's traps, on July 12th? A. Yes.

Q. Will you look at your memoranda and see what time it was that you examined trap No. 1?

A. No. 1 on July 12th?

(Testimony of Jesse L. Neville.)

Q. Yes. What time? A. 9:49 [199—73]

Q. In the morning? A. Yes, A. M.

Q. Now, on that same date you have testified that you examined the T. P. Co.'s Trap No. 6? What time on that date did you see that?

A. On T. P. Co. No. 6?

Q. Yes. A. 7:45 A. M.

Q. And in the meantime, between these two hours you have given, you had examined all the company's traps commencing from one to six?

A I don't know; I don't know whether we did or not; I don't know how they come in order there. We might have got to three first, might have got to two first, I don't remember. I can read off the times here and let you subtract them.

Q. Now don't get smart. Can you tell how long you were in examining traps one to six of the defendant company?

A. I can give you the exact times.

Q. Can you tell how many hours you put in there examining those traps?

A. No, not without taking a pencil and paper and figuring it up.

Q. You don't know when you visited the first trap and when you visited the last trap on July—in that series? A. Yes, I can by looking at my notes.

Q. I want to find out when you visited the traps in the series of one to six.

A. I examined trap No. 6 at 7:45 A. M. I examined trap No. 3 at 9:15 A. M. I examined trap No. 1 at 9:49; trap No. 2, 9:44. I can give you all of

(Testimony of Jesse L. Neville.)

them if you wish, the exact times we were there.

Q. Go ahead.

A. Then No. 5 was 8:45 A. M., No. 4, 9 A. M. I think that is [200—74] all of them.

Q. That is the series of six?

A. That is the series of six.

Q. Did you get out of the boat in any of the traps—I guess it is a gasoline boat?

A. It is a gasoline boat. I don't think I got out on any of those traps there.

Q. Then the distances you gave about these places being open was an estimate? A. Why—

Q. Was it an estimate or did you measure it?

A. Measured it with the eye.

Q. Measured it with your eye? A. Yes.

Q. That is the way you got it. How far apart are those traps from one to six; that is, commencing—Do they run in No. 1 and No. 2, No. 3, or how do they run?

A. No, I don't think they do. I don't remember whether they do or not.

Q. What distance of ground did you travel over when you examined traps one to six?

A. I don't know.

Q. Don't you know the distances between the traps? A. No.

Q. What were you, captain or engineer?

A. I was the captain.

Q. You were running the gasoline boat "Santa Rita"? A. Yes.

Q. And you can't give to the jury any estimate

(Testimony of Jesse L. Neville.)

at all to show your running time consumed in running from one to six?

A. I might give an estimate and might miss it from one to two miles. I don't know. The way the traps were situated, they [201—75] were very very far connected and if I might estimate I might make an estimate of between eighteen hundred and two thousand feet, but maybe there would be a trap in between and that would make a difference of a lot of feet.

Q. The traps are not two miles apart?

A. Not that I remember.

Q. Couldn't you give the exact distances?

A. I could give you the distances, I guess.

Q. You don't know the distances between the traps?

A. I think I told you I didn't know the exact distances between the traps.

Q. How far was trap No. 1 from trap No. 6 which you examined that day?

A. I told you I didn't know.

Q. You don't know it?

A. Not any more than you do.

Q. Still you were running the boats and went out there with Walker for the purpose of making this memoranda and testifying in the case, did you?

A. I did, and I am telling you I can go and get our log and give you pretty near the exact distance if you want it.

Q. You couldn't make an estimate without the log?

A. No, I wouldn't; I don't think it is worth while.

(Testimony of Jesse L. Neville.)

Q. In 1035, I believe you said you assisted in examining the Thlinket Packing Company's No. 11?

A. Yes.

Q. And also the company's trap No. 12?

A. Yes.

Q. What time did you arrive—I will ask you this question: Do you know whether you visited trap No. 11 or 12 first?

A. It was No. 12, if I remember right. [202—76]

Q. What time did you get there?

A. We got there at 8:40.

Q. What time did you examine the other one?

A. We examined the other one at 9:20.

Q. What is the distance between those two traps?

A. I should say about eighteen hundred feet, maybe a little more, maybe a little less.

Q. Those traps are near-by, are they? The nearest you can give is that they are eighteen hundred to two thousand feet apart, those two traps?

A. I won't say; it might be two thousand feet or more or two thousand feet or less.

Q. Don't you know that there is not a trap of any one you have been testifying to here any nearer together than a mile? A. I don't know any such thing.

Q. Would you testify that they weren't any closer together than a mile?

A. No, I wouldn't unless you would give me a chance to measure them up. I won't testify to anything I don't know.

Q. I believe in this 1036,—I believe you testified

(Testimony of Jesse L. Neville.)

you visited two or three traps there?

A. Which one?

Q. How many more traps have you got there which you examined—one of these indictments you didn't go to?

A. I went to T. P. Co. No. 2 on August 9th at 6:38 A. M. I think I went to No. 1—I am not certain; I will look it up here. Yes, I went to No. 1.

Q. Did you go to No. 1 and 2 on that date?

A. Yes.

Q. Which one did you examine first?

A. I think we examined No. 2 first; I couldn't swear positively without looking at my notes. [203—77]

Q. Do you remember what time?

A. Yes, the time was 6:38 A. M.

Q. When did you examine the other one?

A. 6:43.

Q. Do you know the distance between those two traps?

A. Of course, I know in a certain way; I know it isn't very far. I don't think it is over sixteen, seventeen or eighteen hundred feet, but I am not going to say that that is the distance.

Q. How many traps did you get out and go on the traps? A. I don't remember.

Q. How many traps did you get out on?

A. I know I got out on eleven and twelve, but I don't remember whether I did the rest or not.

Q. What part did you get on on traps No. 11 and 12? A. On the trap.

(Testimony of Jesse L. Neville.)

Q. Do you know the heart, pot, spiller and lead?

A. I do.

Q. Tell what part you got on.

A. I climbed on top of No. 12 until I got on top of the foot-pole and walked all around it.

Q. Climbed the rope from what part of the trap?

A. Fish-trap.

Q. Heart or spiller?

A. I don't remember whether it was the heart or spiller; I think it was pretty near the center of the trap, if I remember right.

Q. That is No. 12? A. Yes.

Q. How long did you stay at that time?

A. I don't know.

Q. What part of the trap did you get off at?

A. I don't know. Maybe the watchman can tell you. [204—78]

Q. Why don't you answer? A. I don't know.

The COURT.—Wait a minute. If you don't know, don't say anything but that you don't know.

Q. (By Mr. WINN.) What part of the trap were you on on No. 11?

A. All over the trap except on the lead.

Q. How long did you stay there?

A. I don't know that either.

Q. These were the only two traps you were on?

A. On that particular date I think they were.

Q. How many traps were you on of this particular company?

A. I don't remember; I know I have been on a

(Testimony of Harry Ward.)

good many traps, but I don't remember which one nor when.

Mr. WINN.—That is all.

(Witness excused.) [205—79]

[Testimony of Harry Ward, for Plaintiff.]

HARRY WARD, a witness called and sworn in behalf of the United States, testified as follows:

Direct Examination.

(By Mr. REAGAN.)

Q. Mr. Ward, will you state your full name to the jury? A. Harry Ward.

Q. You live in Juneau? A. Yes, sir.

Q. How long have you lived here?

A. It will be four years next August.

Q. What were you doing in the months of July and August, Mr. Ward?

A. I was engineer aboard the "Santa Rita."

Q. Now, Mr. Ward, will you state whether or not you made any trips with the "Santa Rita" during July and August? A. I did.

Q. With whom?

A. With the U. S. Fish Commissioner.

Q. Do you remember the date of the first trip you made in July last? A. July 11th, I think.

Q. On the occasion of that trip, will you state whether or not you visited the trap belonging to the defendant company called and designated trap No. 1?

A. On July 11th?

Q. On the occasion of that trip you started out on July 11th? A. I did visit it, yes.

Q. Do you remember what hour you reached there?

(Testimony of Harry Ward.)

A. On July 11th, trap No. 1?

Q. On what date did you reach that trap? [206—80]

A. We left here July 11th and I think we got up there the morning of the 12th in the forenoon.

Q. Do you remember what hour of the 12th you reached trap No. 1?

A. I think it was around nine o'clock sometime; I couldn't say for sure, because I have lost my notes on that.

Mr. WINN.—I move to strike out the answer. The witness says he simply thinks it was a certain hour. The times in these indictments are matters of importance.

Mr. REAGAN.—Time isn't essential as long as we get it between the hours mentioned in the law. I am asking what time he got there—that is all.

The COURT.—Objection overruled.

Q. (By Mr. REAGAN.) Did you observe that trap on the occasion of that trip, Mr. Ward, with reference to the webbing on each side of the heart—at the time of that trip?

Mr. WINN.—I object to it. There is no time set.

The COURT.—Objection overruled.

A. I did not of No. 1.

Q. (By Mr. REAGAN.) Did you or did you not reach the trap—trap No. 2 of this defendant?

A. Yes.

Q. Do you remember when you reached there?

A. I don't remember the hour; it was a few minutes later—a few minutes run, that is all.

(Testimony of Harry Ward.)

Q. Do you remember what order—which one you reached first, No. 1 or No. 6?

A. We started at six and went up to one on these particular traps.

Q. So the time would be earlier?

A. Backwards, yes.

Q. Did you observe on the occasion of that trip and at the time of visiting that trap the webbing of the heart of that trap [207—81] on each side of the heart next to the pot?

Mr. WINN.—If he answers “yes or no,” I have no objection.

The COURT.—Answer the question yes or no.

A. What is the question again?

Q. (By Mr. REAGAN.) Did you observe—look at and see the webbing of the heart of that trap on the occasion of that visit? A. No, not on No. 2.

Q. You didn’t see No. 2. Did you on the occasion of that trip visit trap No. 3 of this defendant company? A. Yes, we did.

Q. And you arrived there a little earlier than you did on the other, I suppose? A. Yes.

Q. Did you observe—did you look at and see the webbing on the heart of that trap next to the pot?

A. I noticed them, yes.

Q. Will you state from your observation made at that time what was the condition of twenty-five feet of the webbing or netting of the heart next to the pot of that trap with reference to being lifted or lowered?

Mr. WINN.—I object to the question as incompetent and immaterial,—no time placed.

(Testimony of Harry Ward.)

The COURT.—He says this trip, the 12th, a few minutes before the other one. It seems to me that the time is absolutely immaterial provided it is the time between six o'clock Saturday night and six o'clock Monday morning.

Mr. WINN.—He hasn't fixed the time.

The COURT.—Suppose he can't fix it, but any time somewhere between those two dates. He has fixed it between those two dates. That is good enough. [208—82]

Mr. WINN.—The 11th, as I understand, was on Saturday.

Mr. REAGAN.—Yes. He said he arrived there the morning of July 12th.

The COURT.—Objection overruled. Fix the time as near as you can.

Q. (By Mr. REAGAN.) About what hour, if you remember, did you arrive at the trap?

A. It was in the morning—must have been around eight o'clock. I can't say for sure, but I know it was around that time.

The COURT.—Q. Morning of what date?

A. Morning of the 12th.

Q. What day of the week? A. Sunday.

Q. (By Mr. REAGAN.) I ask you what was the condition of the webbing or net of the heart of that trap, twenty-five feet thereof next to the pot, with reference to being lifted or lowered?

A. Well, I noticed it was around—the shove-down was around—the short shove-down, the top of it was around the first pile, just about back to the first pile.

(Testimony of Harry Ward.)

Q. How many feet?

A. I should say about twelve feet.

Q. With reference to the entire twenty-five feet, what would you say as to its condition with reference to being lowered or raised, the twenty-five feet of the webbing next to the pot?

A. I should say it wasn't.

Q. Wasn't lowered?

A. Wasn't lowered or raised, either one.

Q. Now, did you visit on that occasion the trap of this defendant company No. 4?

A. Yes. [209—83]

Q. Did you notice the condition—did you observe the heart walls of that trap for a distance of twenty-five feet back from the pot—did you look at it?

A. I did.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap next to the pot with reference to being raised or lowered?

A. It was not raised or lowered twenty-five feet.

Q. What was its condition?

A. Well, the shove-down was back on a slant about around the first pile.

Q. About how far back was that pile from the pot?

A. I should say about ten or twelve feet.

Q. About how was it at the water line?

A. I couldn't say that, because I don't know.

Q. Did you notice the tunnel leading into the pot of that trap? A. That is, on No. 4?

Q. Yes. A. Well, I can't recall.

Q. Don't state anything you don't remember.

(Testimony of Harry Ward.)

A. Well, I can't recall it.

Q. Now, in No. 5 on the occasion of that trip, did you visit the trap of this company No. 5? A. Yes.

Q. Did you look at the webbing of the heart of that trap on each side of the heart next to the pot—did you see it? A. I did.

Q. What was its condition—that is, the condition of the twenty-five feet next to the pot on each side, that is, the webbing or net of that heart, with reference to being raised or lowered?

A. It wasn't raised or lowered twenty-five feet.
[210—84]

Q. What was the condition?

A. Well, it was about the same as the rest of those—the top of the short shove-down was around the first pile.

Q. A distance of about how many feet?

A. Well, ten or twelve feet, I should say.

Q. Did you notice how far it was open at the water-line?

A. I noticed at the time, but I can't remember now.

Q. Did you notice the tunnel of that trap No. 5? Did you see it?

A. I noticed the tunnel, but I can't recall exactly what was the condition.

Q. Now, did you visit trap No. 6 of this defendant company on the occasion of that trip? A. Yes.

Q. Did you look at and see the webbing of the heart on each side next to the pot of that trap?

A. No, I didn't.

Q. You didn't see that, didn't see No. 6 at all?

(Testimony of Harry Ward.)

A. I saw the trap. I got out and held the boat—it was a little bit rough at the time, but I didn't pay much attention to the trap on account of being pretty busy.

Q. Did you go on that trap?

A. I believe Mr. Walker did, if I am not mistaken.

Q. Did you observe the tunnel?

Mr. MUNLEY.—I think he probably didn't observe it at all.

Q. (By Mr. REAGAN.) Did you observe any part of the trap? A. No, I don't think I did.

Q. So you don't know anything about that trap at all. Next indictment—did you take a trip subsequently to these traps? A. Yes.

Q. What time?

A. I believe it was August 8th. [211—85]

Q. You started August 8th?

A. If August 8th was Saturday—we started in the afternoon, I know that.

Q. Do you remember on the occasion of that trip whether or not you visited trap No. 11 of this defendant company? A. We did.

Q. Do you remember what hour you arrived there?

A. It was in the evening—nine o'clock I should say. I have the exact date of that—no, on No. 11 I have not.

Q. At nine o'clock, the 8th, the day you started?

A. Yes, same evening.

Q. Did you look at the webbing of the heart of that trap so that you saw it? A. Yes.

Q. What was the condition of the webbing or net

(Testimony of Harry Ward.)

of the heart of that trap on each side next to the pot with reference to being lifted or lowered?

A. It was not lifted or lowered twenty-five feet.

Q. What was its condition?

A. Well, it was back around somewhere—the top shove-down was back about the first pile on No. 11.

Q. A distance of how long?

A. I should say it was ten or twelve feet.

Q. On the occasion of that trip, did you visit trap No. 12 of this defendant company? A. We did.

Q. About what time did you arrive there; do you remember?

A. About 8:40. I have the exact time of that; that is the only one I have put down.

Q. Of August 8th? A. Yes. [212—86]

Q. Did you look at and see the webbing on the heart of that trap next to the pot? A. I did.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side next to the pot with reference to its being lifted or lowered at that time?

A. It was not lifted or lowered twenty-five feet.

Q. What was its condition?

A. Well, the shove-down pole was around the first pile, pretty near the top of it.

Q. And that would be about what distance back to the pile? A. Ten or twelve feet.

Q. About how much variance would there be?

A. Between the traps, you mean?

A. No, as to being—I understood you to say that

(Testimony of Harry Ward.)

there was a distance of about ten or twelve feet, but it would vary?

A. It would vary between ten and twelve feet, you know, maybe less and maybe a little more, I am not sure.

Q. Next indictment. Did you also on that trip visit trap No. 1 of this defendant company?

A. That is, August 9th?

Q. Yes.

A. That would be the same trip we visited eleven and twelve?

Q. On the same trip, yes.

A. We did.

Q. What time were you there?

A. It was early—I have notes to tell those.

Q. Where are they? A. In my pocket.

Q. Suppose you refresh your memory—Did you make those notes at the time?

A. I did. [213—87]

Q. Are they correct—were they correct at the time you made them?

I suppose they were correct. I made them from the time on the boat there.

Q. Well, go ahead and look at them.

A. Trap No. 1, did you say?

Q. Yes.

A. I haven't trap No. 1 here; I thought I did, but I haven't.

Q. You remember being there on the 9th of August, however? A. Yes, I was there.

Q. 1914, was it, this last August? A. Yes.

(Testimony of Harry Ward.)

Q. Did you look at the tunnel going into the pot of that trap so that you could see what condition it was in? A. No. 1?

Q. Yes, did you look at it—did you see it?

A. No, I can't recall absolutely.

Q. Did you look at the webbing or net of the heart of that one?

A. Well, I noticed that the heart walls—the opening was not back as it should be, twenty-five feet.

Q. About how far back was it?

A. The top of the shove-down was about ten or twelve feet. They were about all the same.

Q. When you say the top of the shove-down was back a distance of ten or twelve feet, where was the bottom of the shove-down?

A. I should judge—say on a slant lashed to the middle of the shove-down, because some of them you could see at low tide, the lashing.

Q. When you say the shove-down was open ten or twelve feet or whatever distance, how was the bottom of the shove-down in each of these cases—was it fastened? [214—88]

Mr. WINN.—He is examining him with regard to trap No. 1. I wish he would examine him regarding trap No. 1.

The COURT.—Yes. You mean trap No. 1?

Mr. REAGAN.—I am asking him about—

The COURT.—Read the question.

(Q. read by steneographer:) When you say the shove-down was open ten or twelve feet or whatever distance, how was the bottom of the shove-down in

(Testimony of Harry Ward.)

each of these cases—was it fastened?

Mr. WINN.—I object to it because he has gone over it. He has stated that he doesn't know as regards some and now he wants him to say this—

Mr. REAGAN.—I am asking him about the ones he has testified about. He testified the shove-down was so and so.

The COURT.—If his one answer refers to one trap, it is all right. If he answers as relating to all the traps he has testified to, the one answer would cover everything. If he doesn't answer with reference to all the traps he testified to, he must answer what traps it does refer to and what traps it doesn't.

Q. (By Mr. REAGAN.)—In the cases you have already testified to, where you have testified that the top of the shove-down was open a certain number of feet, in each of those cases, how was the bottom of the shove-down? A. It run to a slant—

Mr. WINN.—I object to the question before the answer, because he is repeating it now in each of these cases.

The COURT.—Objection overruled.

A. The bottom of the shove-down, I should say, the lashing come about low tide.

Q. (By Mr. REAGAN.) Low tide? [215—89]

A. Or a little below that.

Mr. WINN.—I object to that because he is saying all of these traps.

The COURT.—Now, gentlemen, if he can testify that what he testified to in relation to the shove-down relates to all traps he is testifying about, let him say

(Testimony of Harry Ward.)

so. If he doesn't say so, let him say which one it does refer to. That doesn't hurt any one.

Q. (By Mr. REAGAN.) Does the condition of the shove-down, as you have stated, relate to all the traps you have testified about, or does it relate to only some of them?

Mr. WINN.—I object to the question on the ground that it is incompetent, irrelevant, and immaterial, and there has been no foundation laid for the witness to answer the question.

The COURT.—Objection overruled.

Mr. WINN.—I objected to the other question because he has not laid a foundation pertaining to all these traps because he hasn't shown his knowledge of the tide. He guesses at low tide.

The COURT.—Read the question.

(Q. read by stenographer:) Q. In the cases you have already testified to, where you have testified that the top of the shove-down was open a certain number of feet, in each of those cases how was the bottom of the shove-down? A. It run to a slant— (Objection overruled.) A. The bottom of the shove-down I should say the lashing come about low tide. Q. Low tide. A. Or a little below that.

Mr. REAGAN.—I didn't say anything about the tide.

Mr. WINN.—Yes, you did.

The COURT.—Proceed. [216—90]

Q. (By Mr. REAGAN.) About how many feet would that be from the capping at the top of the piles; about how many feet would you say?

(Testimony of Harry Ward.)

A. I should say about twenty-five feet; maybe a little more than that.

Q. And each of these traps you testified to, was that the condition or wasn't that the condition?

A. That was the condition.

Q. In each case? A. In each case.

Q. Now, trap No. 1 on the 9th of August; did you testify how the webbing was in the heart walls of that trap, or haven't you testified?

A. On No. 1 the August trip?

Q. August trip; you testified you reached there the morning of August 9th? A. Yes.

Q. Have you testified as to what you found as to the condition of the heart walls or webbing of the heart walls of the trap next to the pot a distance of twenty-five feet? A. On No. 1?

Q. Yes. A. I think so.

Q. What did you say?

Mr. WINN.—I object to the question—he has gone over that once.

A. I testified, I think so.

The COURT.—Q. What did you say? Was it lowered or raised twenty-five feet?

A. Well, it wasn't.

The COURT.—Ask him another question.

Q. (By Mr. REAGAN.) What condition was it in? [217—91]

A. Well, about the same condition as the others.

Q. Did you visit trap No. 2 on that trip of this defendant company? A. Yes.

Q. Did you notice the tunnel leading into the pot

(Testimony of Harry Ward.)

of that trap? Did you look at it?

A. Well, I noticed it, but I don't recall any.

Q. Did you look at and observe the walls of the heart—the webbing or net of the heart of that trap on each side next to the pot—did you see it?

A. Yes.

Q. What was its condition as to being lifted or lowered twenty-five feet on each side next to the pot on that occasion,—was it or was it not?

A. It was not.

Q. What condition was it in?

A. Well, the shove-down was—the short shove-down was slanting back to about the first pile.

Q. And the bottom of the shove-down was where?

A. It was down twenty-five or thirty feet on the long shove-down.

Q. Attached to the long one?

A. Yes, I think it was lashed.

Q. Did you visit trap No. 3 of this defendant company on the occasion of that visit? A. Yes.

Q. What day was that?

A. August 9th, I think, six o'clock.

Q. With reference to six o'clock Saturday afternoon of the 8th and six o'clock Monday morning of the 10th, was it without or within those hours?

A. I don't understand the question. [218—92]

Q. At the time you visited this trap No. 3, was it or not between six o'clock Saturday afternoon of the 8th and Monday morning six o'clock of the 10th?

A. Why, sure it was in the closed season.

Q. Did you observe—did you look at the tunnel of

(Testimony of Harry Ward.)

that trap leading into the pot? A. At No. 3?

Q. Yes. A. I believe I did.

Q. Do you remember what condition it was in?

A. I think it was slacked away, but I don't think it was clear closed.

Q. Did you look at the webbing of the heart of that trap on each side next to the pot?

A. I noticed them, yes.

Q. With reference to that occasion during that closed season, what was the condition of the twenty-five feet of webbing or net of the heart of that trap as to being lifted or lowered twenty-five feet?

A. It was not lifted or lowered twenty-five feet.

Q. What was its condition?

A. The top of the short shove-down was down some way; some were closer than others and extended back a little further; but all around about the first pile.

Q. And the bottom of the short shove-down?

A. It was twenty-five or thirty feet down on the long shove-down. I never measured it, but I judged from how the tides are.

Q. Did you visit during that closed season trap No. 3-A of this defendant company? A. Yes.

Q. Did you observe the tunnel of that trap entering the pot?

A. I think I did observe the tunnel of that on 3-A.
[219—93]

Q. You did?

A. I am pretty sure, because I noticed it was a wire tunnel, if I am not mistaken.

(Testimony of Harry Ward.)

Q. What was its condition as to being opened or closed?

A. I don't think it was absolutely closed.

Q. Did you look at the webbing on each side of the heart on that trap for a distance of twenty-five feet of the pot—did you see it? A. Yes.

Q. What was the condition of the webbing or net of the heart of that trap on each side next to the pot, twenty-five feet thereof, with reference to being lifted or lowered at that time?

A. It was not lifted or lowered twenty-five feet.

Q. Did you on that visit during that closed season visit trap No. 4 of this defendant company?

A. Yes.

Q. Did you see the tunnel of that trap leading into the pot? A. Yes.

Q. What was its condition as to whether it was opened or closed at that time?

A. It was slacked away, but wasn't all closed.

Q. Did you look at and see the walls of the heart next to the pot of that trap at that time? A. Yes.

Q. What was the condition of twenty-five feet of the webbing or net of the heart of that trap on each side of the pot with reference to whether it was lifted or lowered?

A. It was not lifted or lowered twenty-five feet.

Q. Did you on that same occasion and during that same closed season visit trap No. 6 of this defendant company? A. Yes. [220—94]

Q. Did you look at and see the tunnel leading into the pot of that trap? A. Yes.

(Testimony of Harry Ward.)

Q. What was its condition as to being opened or closed? A. Tunnel opened about two feet.

Q. Did you look at and see the walls of that trap during that closed season? A. Yes.

Q. What was the condition of twenty-five feet of the webbing or net of the heart on each side next to the pot, for twenty-five feet thereof, on that occasion, with reference to being lifted or lowered?

A. It wasn't lifted or lowered twenty-five feet.

The COURT.—Q. When you say it wasn't lifted or lowered twenty-five feet, do you mean it wasn't lifted twenty-five feet from the ground?

A. I mean there wasn't twenty-five feet of an opening in the heart on the part next to the pot walls.

Q. You mean a space horizontally was not lifted or lowered?

A. There was a space that was not open twenty-five feet.

Q. (By Mr. REAGAN.) Right next to the pot?

A. Right next to the pot.

Q. In the heart? A. In the heart walls.

Q. Did you visit trap No. 9 during that same closed season on that trip? A. Yes, we visited it.

Q. Did you observe the tunnel of that trap at that time? A. No, I can't recall that I did.

Q. Did you look at and see the webbing on each side next to the pot? A. Yes. [221—95]

Q. Will you state what was the condition of twenty-five feet of the webbing or net of the heart of that trap with reference to its being lifted or lowered or otherwise opened?

(Testimony of Harry Ward.)

A. It was not lifted or lowered twenty-five feet back or otherwise opened.

(Whereupon Court adjourned until 2 P. M., the same day, when Court reconvened pursuant to adjournment, the jury and counsel being present.)

Cross-examination.

(By Mr. WINN.)

Q. What did you say your name is?

A. Harry Ward.

Q. Where do you live? A. Juneau.

Q. How long have you lived here?

A. It will be four years next August.

Q. What is your business?

A. Carpenter as a rule.

Q. How many times were you out for this fish commission? A. Three times, I believe.

Q. Three times—that was on the 9th of August, 12th of July—

A. There were several days in succession, but that was the time, around that.

Q. Do you have any objection to my seeing those notes you testified from this morning? A. No.

Q. Did you make these at the request of Walker?

A. I did.

Q. You made them while you were at the trap?

A. I did. [222—96]

Q. You made them while you were at the respective traps that they refer to? A. Yes.

Q. These notes that you have pertain to how many of the traps?

A. There are some of them that aren't there; some

(Testimony of Harry Ward.)

are there—I lost a few of the notes.

Q. Now, you have testified concerning—I think you testified as being with them and, of course, if you want to refresh your memory from your notes, you may do so,—I want to see how many of these traps—see if I am right about them. The first series of questions put to you by the District Attorney was about the 12th day of July, 1914, about being at trap No. 1 of the Thlinket Packing Company. You were at that trap, were you?

A. On the 12th of July, yes.

Q. On Sunday, July 12th, you were at that trap?

A. Yes, sir.

Q. Then the next place is on the same date; you were at trap No. 2 of that company? A. Yes.

Q. And then on the same date you were at trap No. 3? A. Yes.

Q. On the same day you were at trap No. 4?

A. Yes.

Q. On the same day you were at trap No. 5?

A. Yes.

Q. On the same day you were at trap No. 6?

A. Yes.

Q. Now, that series you were there. Now, the next one is on August 8th; the first count here makes a complaint about trap No. 11; you were at that trap on August 8th. On the same date you were at trap No. 12? [223—97] A. Yes.

Q. Then on the same date in August, that is, between August 8th and 9th, you were at trap No. 1 of this company—that was in August? A. Yes.

(Testimony of Harry Ward.)

Q. And then on the same date you were at trap No. 2 of this same company? A. Yes, sir.

Q. Between those said dates. Then you were at trap No. 3? A. Yes.

Q. And trap No. 3—A of this company? A. Yes.

Q. And also trap No. 4? A. Yes.

Q. And trap No. 6 and T. P. Co.'s No. 9?

A. Yes.

Q. All between these dates. You were engineer on this gasoline launch, were you? A. Yes, sir.

Q. Now, I will ask you if on those same dates you went to any other traps? A. We did.

Q. On that same date, on August 12th, you went to one of the Pacific American Fisheries Company's traps?

Mr. REAGAN.—I object to the question on the ground that it is not involved in this case at all.

The COURT.—I don't know whether it is or not. I cannot tell from that question.

Mr. REAGAN.—It is not cross-examination.

The COURT.—It might be. I cannot tell what it is leading up to. Objection overruled. Answer the question. [224—98]

Q. (By Mr. WINN.) On July 12th, between the same dates, July 11th and 12th, you went to the Pacific American trap No. 2, didn't you?

A. P. A. F.?

Q. Yes.

A. Well, I don't know just where that is situated right now?

Q. Well, you went to a number of the Pacific

(Testimony of Harry Ward.)

American Fish Company's traps that day, didn't you? A. We passed several of those traps.

Q. You stopped and examined those with this same man, the fish commissioner? A. Yes, sir.

Q. You know you were at the Pacific American Fisheries trap No. 2 on that same day?

A. I wouldn't say I was, because I don't know where it is situated just now.

Q. Did you take any notes on those traps?

A. Yes, I did,—the same particular notes I did on these other traps.

Q. But you wouldn't know whether you were on one of the Pacific American Fisheries traps unless you had your notes?

A. Yes; I told you I was on some of those traps; if I knew where they were situated, I could tell where I was at.

Q. Would your notes tell whether you were at the Pacific American Fisheries traps that date?

A. I don't know whether I have those notes or not. I can look and find out.

Q. Well, did you visit also with this same fish company, the Pacific American Fisheries Company, No. 3 trap,—you visited two of the P. A. F. traps on that date? A. Yes.

Q. Didn't you visit number—didn't you visit P. A. F. No. 4 on [225—99] that date too?

A. Just wait a minute. I think I have some notes on that. A. P. F. No. 4, yes.

Q. P. A. F.; what have you got? A. A. P. F.

Q. Alaska Puget Sound?

(Testimony of Harry Ward.)

Mr. REAGAN.—Alaska Pacific.

Mr. MUNLEY.—Astoria & Puget Sound.

Q. (By Mr. WINN.) You were at one of those on the same date too. Now, weren't you at P. A. F. No. 4 that day? A. I think so, yes.

Q. And at P. A. F. No. 5; you were at five traps of the Pacific American Fisheries on that date, weren't you, between the eleventh and twelfth?

A. We were at more than that, I think.

Q. More than the Pacific American Fisheries?

A. I think we covered all of them in that territory out there; I am not sure.

Q. Also, were you at the P. A. F. No. 6, marked P. A. F. No. 7, No. 9, No. 10 and No. 12?

A. I think we covered all those, yes.

Q. If Walker was there you were there?

A. I was.

Q. Now, on the 9th of August, being one of the dates that you have testified concerning the Thlinket Packing Company's traps, I will ask you if you weren't at trap No. 2 of the Pacific American Fisheries on that day too—Pacific American Fisheries?

A. I think so.

Q. And P. A. F. No. 3,—if Walker was there you were there? A. Yes.

Q. And P. A. F. No. 4? A. Yes. [226—100]

Q. And P. A. F. No. 5? A. Yes.

Q. And No. 6, No. 9, No. 10, No. 11 and No. 13; you were at all those traps on that date, August?

A. Yes.

Q. Now, here is one you mentioned a while ago,

(Testimony of Harry Ward.)

Astoria & Puget Sound Canning Co.; on July 12th, this same day, you testify concerning the Thlinket Packing Company's traps, between the eleventh and twelfth, you were at the Astoria & Puget Sound trap No. 3, weren't you, and the same company No. 5?

A. Yes.

Q. Now, the Glacier Fisheries Company; you were along with the fish commissioner when he was out there too, weren't you? A. I was.

Q. On July 12th, between the 11th and 12th, between one of the same days you testified concerning the Thlinket Packing Company, you were at the Glacier Fisheries Company's No. 4, weren't you; and on the same date, July, between those same dates, you were at that company's trap No. 6? A. Yes.

Q. Now, on the next day, between the eighth and ninth of August, you were at the Glacier Fisheries Company trap No. 6, weren't you, in August—those others were in July?

A. Between the 8th and 9th of August?

Q. Yes, the same dates as the Thlinket Packing Company, between the 8th and 9th?

A. In the closed season, yes. I don't know whether it was between the 8th and 9th or not.

Q. You were there on Sunday the 9th? A. Yes.

Q. And on Sunday the 9th you were at this Glacier Fisheries Company No. 3 trap, weren't you? [227—101] A. Yes.

Q. And also on the same date you were at the same company's trap No. 7? A. Yes.

Q. And also the Glacier Fisheries trap No. 9?

(Testimony of Harry Ward.)

A. Yes.

Q. The same company's No. 10? A. Yes.

Q. How fast does your boat run?

A. Well, I should say about—pretty close to eight knots.

Q. Between these two dates, in August, as I have mentioned to you, and the dates you mentioned in July, you took in that whole scope of country with this fish commissioner and examined all those traps, didn't you? A. Yes.

Q. Do you know about how much ground you covered on each one of those trips?

A. Well, I know the territory we covered, but I don't know how much ground we covered, but I could almost outline—

Q. If you had a map?

A. Yes. I could outline the directions we took.

Q. You wouldn't have any judgment as to the number of miles you covered approximately? Say the fish-traps in July, on the 12th I believe those indictments are—between the Saturday and Sunday?

A. And the Monday morning?

Q. Between the Saturday evening that you have examined your first trap up to Monday morning?

A. I should say close to two hundred miles, somewhere around there.

Mr. REAGAN.—We can get the exact mileage for you, if you want it, Mr. Winn. [228—102]

Mr. WINN.—Thank you.

Q. How many traps of this Thlinket Packing Company were you upon; that is, out of your boat and on it?

(Testimony of Harry Ward.)

A. Well, I was on No. 11 and No. 12.

Q. On No. 11 and No. 12. What part of those traps were you on? A. Well, I was up on top.

Q. What part of the trap? A. What part?

Q. Yes, what part?

A. I went all around, went around the pot, went around the spiller, and out around the heart as far as I could get.

Q. No. 11? A. Yes.

Q. No. 12, were you on top of that one? A. Yes.

Q. They were all of the Thlinket Packing Company's traps you were on during those two rounds out in the gas boat? A. I think so.

Q. Mr. Walker took you and Mr. Neville along to be witnesses in the case, did he?

A. Why, we were to run the boat, but we were supposed to take notes of what we saw.

Q. Did he mention that before you got out there or before you got out to the fish-traps?

A. He mentioned it to us before we started.

Q. You and Neville were to go along and go in the capacity of engineer and the other as captain of the boat, and also to serve in the capacity of witnesses? Did he tell you what he wanted you as witnesses for?

A. He didn't say, but I supposed he wanted us for witnesses, nothing else.

Q. On the trial of some case he proposed to bring?
[229—103]

A. I didn't know whether it was going to be tried or not.

(Testimony of Harry Ward.)

Q. You knew you couldn't be a witness unless there was a trial, didn't you?

A. I wouldn't think so.

Q. You never was a witness unless there was a trial on, were you?

A. Yes; a witness may be a witness to things. You don't have to be on the witness-stand to be a witness to things.

Q. You mean witnesses to a paper. If they are testifying it is upon the trial, isn't it?

Q. Generally, yes.

Q. Did you say that all of these pull-back sticks, or closing sticks, on both sides of the traps in those traps you testified concerning this morning were tied and made fast to the first pile?

A. I said the shove-down.

Q. Well, we call it the pull-back stick, or shove-down; you call it the shove-down. You said it was made fast to the first pile, did you?

A. I didn't; I said it was made fast to the long shove-down.

Q. You didn't testify—I understand that now. Then when it was pulled back, did you testify what it was made fast to?

A. I don't know whether it was made fast—it was tied—you mean the top of the shove-down?

Q. Yes.

A. Well, it was made fast in some fashion.

Q. You don't remember what fashion?

A. I think it was tied.

Q. You think it was tied?

(Testimony of Harry Ward.)

A. I think there was a cleat to tie it on where it was tied.

Q. Did you see any ones that were floating in the water—pulled clear back until they floated in the water and lifted in that shape—any of these pull-back sticks or shove-downs or [230—104] close-downs. (Indicating.)

A. I don't remember of any.

Q. Did you hear Neville testify this morning?

A. I did.

Q. Did you hear him testify that some of them were floating in the water?

A. I don't remember as I did.

Q. Well, if he testified to it, you wouldn't want to contradict it, would you, that some of them were floating in the water?

A. If I didn't see it, I wouldn't say I did.

Q. You don't remember yourself of seeing any floating in the water? A. I said I didn't.

Q. And you intended to testify this morning in answer to the prosecuting attorney's question that they were fastened all alike—that is, you meant the closing stick was made fast to the long shove-down on either side or both sides of the trap—they were all made fast the same way? A. Yes.

Mr. WINN.—That is all.

Redirect Examination.

(By Mr. REAGAN.)

Q. Mr. Ward, I want to be sure and understand you right. The shove-down stick that opened that webbing partially, the upper end loose, and was that

(Testimony of Harry Ward.)

upper end fastened anywhere, or was it just pulled back?

Mr. WINN.—He answered it on direct examination. He explained the whole situation.

Mr. REAGAN.—He didn't answer it at all.

Mr. WINN.—And in the cross-examination. [231—105]

Mr. REAGAN.—I don't understand what he is saying—whether before it was opened or after it was opened.

The COURT.—Very well, answer the question.

A. It was fastened at the top.

Q. After it was opened?

A. When I saw them, the shove-down was fastened at the top in or about the first pile at the top cleat—the top of the shove-down.

Mr. REAGAN.—That is all.

Recross-examination.

(By Mr. WINN.)

Q. You didn't see any of those that were floating in the water and pushed clear back—you didn't see any of those, did you?

Mr. REAGAN.—I object to that; he has already answered it.

The COURT.—He may answer it again.

A. I said that I did not.

Q. (By Mr. WINN.) Then you wouldn't want to swear that all of those pull-downs were fastened to the first pile that you saw on the defendant company's traps that day?

A. I couldn't swear that all of them were tied that

(Testimony of Harry Ward.)

way. I wouldn't swear they were all tied that way.

Mr. WINN.—That is all.

(Witness excused.) [232—106]

[**Testimony of J. W. Bell, for Plaintiff.**]

J. W. BELL, a witness called and sworn in behalf of the United States, testified as follows:

Direct Examination.

(By Mr. REAGAN.)

Q. Will you state your full name, Mr. Bell?

A. J. W. Bell.

Q. What position, if any, do you hold at present?

A. Clerk of the District Court, First Division of Alaska.

Q. As such have you charge of the records and files filed with the clerk of the court?

A. Yes, sir.

Q. Have you in your records copies or certified copies, or whatever the law requires, of the articles of incorporation of the Thlinket Packing Co.?

A. Yes, sir.

Q. Will you produce them, please?

Mr. WINN.—I don't care to burden the record; we will admit that the Thlinket Packing Company is a corporation.

The COURT.—And was at the time of these indictments and at the times of these alleged violations?

Mr. WINN.—Yes, sir.

Mr. REAGAN.—That is all.

(Witness excused.) [233—107]

Mr. REAGAN.—I would like to introduce a calen-

(Testimony of J. W. Bell.)

dar for the purpose of showing the dates.

The COURT.—Very well; produce a calendar.

Mr. REAGAN.—I offer in evidence a calendar for the year 1914, showing the dates.

The COURT.—Any objection?

Mr. WINN.—No, sir.

(Admitted in evidence and marked Plaintiff's Exhibit "B.")

Mr. REAGAN.—We offer the fish-trap in evidence for the purpose of illustration.

The COURT.—Do you offer it in evidence?

Mr. REAGAN.—It has already been introduced for the purpose of illustration, if the Court please.

The COURT.—It hasn't been introduced in evidence, has it?

Mr. REAGAN.—Yes, sir, for the purpose of illustrating.

The COURT.—How can you introduce it in evidence for the purpose of illustrating without offering it in evidence?

Mr. REAGAN.—I offer it in evidence in the case.

The COURT.—Any objection?

Mr. WINN.—Yes, sir, the same objection made before—incompetent, irrelevant, and immaterial, and it has not been proven to have been made by any one who understood the construction of a fish-trap, foundation, etc.

The COURT.—Objection overruled.

(Admitted in evidence and marked Plaintiff's Exhibit "C.")

Mr. REAGAN.—The calendar, gentlemen, shows

that the eighth day of August was Saturday, Sunday was the ninth, Monday was the 10th—the closed season beginning at six [234—108] o'clock P. M. the eighth, and ending at six o'clock A. M. on the tenth. In July, the eleventh was Saturday, twelfth Sunday, and thirteenth Monday—the closed season beginning at six o'clock P. M. the eleventh, and ending at six o'clock A. M. the thirteenth. We rest, if the Court please.

(Whereupon the jury was excused from the courtroom for a few minutes, while the following motion was made.)

Mr. WINN.—Come now M. G. Munley and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to wit: Indictments Nos. 1034-B, 1035-B, and 1036-B, and attorneys for said company in all the counts in each and all of those indictments, and move the Court to direct the jury to bring in a verdict in favor of the Thlinket Packing Company, or to dismiss the proceedings for want of evidence to establish each and all of the counts, or any of the counts, set out in the three indictments above mentioned, upon the following grounds and for the following reasons: First, that each several indictment and every count therein does not charge the offense defined and set out in the statute; that each several indictment and every count thereof fails to charge that the defendant did unlawfully fish for, take, or kill salmon of any species.

Second. That there is no evidence to establish such fact in the case; that each and all of the several indictments, and each count thereof, did not allege that the defendant failed to close the gate, mouth, or tunnel, or raise or lower the heart next to the pot in a trap that is designed and used by the defendant to fish for, take, or kill salmon of any species, and that there is no evidence in the case to establish [235—109] such fact.

Third. That each of the several indictments and every count therein does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge of which he is called upon to defend.

Fourth. That each several indictment, and every count thereof, fails to allege that the said alleged fishing was done during the closed season.

Fifth. That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels or the facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to prevent the free passage of salmon in such a way as to embrace every element of the offense defined by the statute.

Sixth. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the district or place excepted from the statute; that is, it was not in Cook's Inlet, the Delta of the Copper River, Bering Sea, or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz.: rod,

spear, or gaff, and that there is no evidence now before the jury to show as to whether or not, if any crime was committed, that it was committed within the prohibited districts of the waters of Alaska as defined by the section under which the indictments are made.

Seventh. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such a manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the [236—110] Court to pronounce judgment in case of conviction according to the right of the case.

Eighth. That there is no evidence in the case on the part of the Government to disprove the fact or to show as to whether or not the way the respective traps were opened that there could or could not be a free passage of salmon and other fishes, counsel for the defendant company claiming that the reasonable construction of the statute is that if the trap was open in such a way so that it did not prevent the free passage of salmon and other fishes, then the spirit of the statute is complied with; that the only thing the statute is intended to prohibit is the free running of salmon and other fishes, and that is an element which it is incumbent upon the Government to establish before it can establish any charge against the defendant company.

The COURT.—The motion will be denied.

Mr. WINN.—I suppose any ruling you make, exceptions are considered to be made?

(Testimony of Robert Forbes.)

The COURT.—Certainly—the statute provides that.

(Whereupon the Court took a short recess, after which, the Court, jury, and all counsel being present, the following proceedings were had. [237—111])

[Testimony of Robert Forbes, for Plaintiff.]

ROBERT FORBES, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. WINN.)

Q. Mr. Forbes, what is your business?

A. Canneryman.

Q. How long have you been engaged in that business? A. Twenty-seven years.

Q. Have you been engaged in that business in Alaska?

A. That is, the fish business and canning business together.

Q. Both on Puget Sound and in Alaskan waters?

A. Yes, sir.

Q. Are you at the head or superintendent, general manager, or what is it?

A. I am general manager of the Pacific American Fisheries' business in Alaska.

Q. In Southeastern Alaska they have one cannery at Excursion Inlet? A. Yes, sir.

Q. And some canneries further up the shore?

A. Yes, sir.

Q. Have you ever had any experience in the trap business?

(Testimony of Robert Forbes.)

A. Yes, sir, I have since I have been in the business.

Q. You have quite a number of traps in Alaska now? A. Yes, sir.

Q. Did you ever operate any traps on Puget Sound? A. Yes, sir.

Q. Now, Mr. Forbes, during this experience of yours, extending over these many years, have you at various times observed the [238—112] habits of salmon when they first find that they are in any way hampered from entering the different parts of what constitutes a fish-trap? A. Yes, sir.

Q. I wish you would explain the habits of the salmon as far as you have been able to observe it upon their first entering the heart of the trap, and tell upon what tides you fish, etc.

A. Well, as a rule, the trap fishes at its best on the flood tide. The fish come in the heart, strike the lead, follow the lead till they strike the heart, then they find it enclosed and they work their way around the heart to the tunnel which enters the pot.

Q. Now, have you observed their habits about entering these pots—do they go in immediately, in herds, or what is the habit of them—do they do anything? What is the action of them around in the heart?

A. They swim around—as a rule they do not enter the pot when they first come in the heart, but they will swim around the edges of the heart and approach the tunnel and turn and go away again, and sometimes they will approach the tunnel a dozen

(Testimony of Robert Forbes.)

times before they enter the pot—before they enter the tunnel. When one starts there may be what we term a school and maybe a part of the school will enter and part of the school will reverse itself and swing back. Maybe when the whole school starts they will all follow into the pot.

Q. I will ask you as a practical fisherman—I will withdraw that. Did you hear the testimony of Mr. Walker this morning, the fish commissioner,—particularly that portion of his testimony wherein he stated that the fish were practically caught when they are in the heart of the trap?

A. Yes, sir. [239—113]

Q. Now, I will ask you whether or not from the standpoint of a practical fisherman and what you have observed of fish—whether or not that is the case or not?

A. I don't think they are practically caught until they are in the scow.

Q. And you have taken them out of the spiller and put them in the scow? A. Yes, sir.

Q. Now, I will ask you, Mr. Forbes, in your observation of these traps also, if you have ever noticed them pass in any numbers, say from the spiller back into the heart and from the heart into the pot, and then out of the heart back into the pot?

A. Yes, sir, frequently.

Q. How is their action compared with any other caged animal?

A. I don't know. I know this, that when a fish finds himself in the pot, at first he works up against

(Testimony of Robert Forbes.)

the tide as a rule as it ebbs or runs against the trap, and after a while he comes to the conclusion that he can't get out that way and is corralled and then he is not so wild and very often when the tide changes, they will reverse themselves and go from the spiller back into the pot. Very frequently before the tide changes, when the fish are entering the spiller—to hold them, you will close the tunnel to prevent them from returning to the pot. The same thing applies to them leaving the hearts. I have often laid on the capping across in front of the heart and watched the action of the salmon going in and out of the pot and back into the pot and out again.

Q. Well, in that case I will ask you, Mr. Forbes, would it be good fishing or practical fishing to leave the tunnel that leads from the pot into the heart open while the web of the heart is down? [240—114]

Mr. REAGAN.—I object to the question on the ground that it is incompetent and immaterial.

Mr. WINN.—There has been some testimony on it. They claim we were leaving the tunnel open and also that testimony as to how much we had pushed down on the side. I simply want to show that there is no fishing of that kind. I think it discredits their evidence.

Mr. REAGAN.—It doesn't make any difference. The law requires them to do that very thing. He asks if that is practical or is it possible. The jury will pass on that—it is immaterial.

The COURT.—How is that material?

(Testimony of Robert Forbes.)

Mr. WINN.—Walker went into this matter and explained the habits of fish. I presume it would be a conclusion. I don't care about it particularly.

The COURT.—Very well; ask another question, then.

Q. (By Mr. MUNLEY.) Mr. Forbes, will you describe the action of the salmon when he approaches an obstacle in his way like the lead of a trap?

Mr. REAGAN.—I object to that as being incompetent and immaterial.

Q. (By Mr. MUNLEY.) Is it different from its action when he gets into the heart and does it differ from his action when he gets into the pot?

Mr. REAGAN.—I object to that.

The COURT.—I think the defendant may develop its theory, Mr. Reagan. Objection overruled.

A. When he strikes the lead he is following the—he is practically on his way to his spawning ground and he may follow the lead at first and may go in-shore and may back-track [241—115] a little bit and follow the lead again until he finally works himself into the heart.

Q. Does he stay in there when he gets in, always?

A. No.

Mr. REAGAN.—I object to that.

Q. (By Mr. MUNLEY.) What is the fact as to his going in and if there is any material from preventing him from going away or going out?

Mr. REAGAN.—I object to that.

The COURT.—According to your own theory of the case, I suppose it isn't competent to know what

(Testimony of Robert Forbes.)

a fish does when he gets into the heart. Objection overruled.

A. When a fish gets into the heart, as a rule, when a heavy tide is running, he will buck the tide and as a rule he will—he is just as liable to go outside as he is inside.

Q. (By Mr. MUNLEY.) Isn't he rather a wary animal and does he go right up to the web, or what is the fact? Is he afraid to approach the web?

Mr. REAGAN.—I object to the question as leading.

The COURT.—Change the form.

Q. (By Mr. MUNLEY.) What is the fact as to the habits when they get into the trap in regard to approaching the web—do they approach it readily or otherwise?

A. It depends; my experience has been that it depends altogether on the tidal conditions.

Q. Doesn't he become wary or otherwise when he enters the traps?

A. He does at first, but after he has been in a while and finds himself confined, he is not so much so, and will work around the trap and when the tide slacks up. He doesn't always confine himself to the contour of the trap—of the heart.

Q. Does he always enter the pot through the tunnel when he gets into the trap? [242—116]

A. No, he doesn't; they certainly do not enter the pot. They come into the heart.

Q. After they reach the heart do they always go into the pot? A. No, sir.

(Testimony of Robert Forbes.)

Q. Do they always go into the tunnel?

A. They do not.

Q. Have you observed salmon frequently steady then awhile after move about the trap?

A. I have.

Q. Have you seen the salmon go into the pot—go through the tunnel, and fully observe his action?

A. Yes, sir; I have watched them go into the tunnel—I have watched them approach the tunnel and go away two or three times and approach it again. I have seen the fish go into the pot and I have watched fish that were marked, that is, had been caught by a seine or line and they had been marked so you could trace them around in the pot, and I have watched them go back and forth.

Q. If the tunnel were pulled aside, even if it were not wholly pulled aside, would the fish enter, in your experience?

Mr. REAGAN.—I object to the question as leading.

The COURT.—It is rather leading; change the form.

Q. (By Mr. MUNLEY.) From your experience as a trapman, when a tunnel is pulled aside to some extent or any extent, does the fish freely enter or otherwise?

Q. You mean when the tunnel is closed?

Q. No, not entirely closed, but simply partially closed.

A. No, I don't think they would enter the small hole partially closed. They are very wary about

(Testimony of Robert Forbes.)

taking the large entrance to the tunnel. That is why it is in V-shape. [243—117]

Q. How wide is the tunnel at the mouth?

A. At which?

Q. At the outer end?

A. It is from ten to twelve feet.

Q. And how wide on the inside?

A. They vary according to the usages of the man who is working it, from six inches to a foot.

Q. You heard some testimony given by the witness Walker as to the opening of the tunnel on the spiller side, where he stated that it was eighteen inches—just as wide as it is going into the pot; is that so—is that a fact?

A. No; we shortened them up very short, six or eight inches. We do that to prevent the fish from returning to the pot.

Q. And what are the habits of salmon as to whether or not they are like some other animal, some other wild animal? Do they follow the leader?

Mr. REAGAN.—I object to the question as leading.

The COURT.—Yes, it is leading, but I don't see any harm in such a question as that.

A. As a rule they follow. In fact, a dog salmon will not trap without some other species to lead it.

Q. (By Mr. MUNLEY.) Isn't that also true of the coho salmon to some extent?

A. No, I don't know that it is so.

Q. How about the king salmon?

A. Well, the king salmon will trap by himself.

(Testimony of Robert Forbes.)

Q. He is a pretty wary salmon also, is he not?

A. Yes.

Q. What width of the opening of the heart next to the pot would permit the free passage of salmon or other fishes in your judgment? [244—118]

Mr. REAGAN.—I object to the question as being entirely improper and entirely contrary to the law. The law says what width must be open.

The COURT.—Objection overruled. I can cover the matter by my instructions to the jury, when I make up my mind how to instruct.

A. I should think two or three feet would certainly be clear track for salmon without any question.

Q. (By Mr. MUNLEY.) And afford free passage for every salmon?

A. Under certain conditions, as I said a while ago, especially when the tide is running. They work around the edges of it, consequently, if they go to this hole they go out.

Mr. MUNLEY.—That is all.

Cross-examination.

(By Mr. FOLSOM.)

Q. After all is said and done, the fish-trap is a pretty effective means of catching fish?

A. Under certain conditions.

Q. Answer the question.

A. Yes; if it wasn't, we wouldn't have them.

Mr. FOLSOM.—That is all.

(Testimony of Robert Forbes.)

Redirect Examination.

(By Mr. MUNLEY.)

Q. Is it possible to catch fish in certain parts of Alaska without a trap?

A. Very few; not in commercial quantities. [245—119]

(By the COURT.)

Q. Mr. Forbes, the leader of the fish is leading them from the heart into the tunnel; then the fish won't go out that space in the heart, will he?

A. How is that?

Q. I understood you to say that the fish follow their leader? A. Very often.

Q. If the leader is leading them from the heart into the tunnel, they won't go out the space between the heart wall, will they?

A. As they approach, like any thing else, as they would approach the tunnel, there will be quite a few that will follow them and the others will break and go off—they won't all follow in at one time.

Q. Some will go in the tunnel and some will go out the space?

A. I don't know that, because I have never watched them when the tunnel was set and the hearts were opened, Judge.

(By Mr. MUNLEY.)

Q. Would it be safe practice to leave the tunnel open if the walls of the heart were down?

A. I wouldn't think so.

Q. Wouldn't it give an opportunity for the fish in the whole trap to come out?

(Testimony of Robert Forbes.)

A. It would give you an opportunity to lose a great many of them. There is no question about it.

Q. Would it be good policy for a trapman to do so? A. I shouldn't think so.

Mr. MUNLEY.—That is all.

(Witness excused.) [246—120]

[Testimony of T. P. Keegan, for Plaintiff.]

T. P. KEEGAN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. MUNLEY.)

Q. Your name is T. P. Keegan? A. Yes.

Q. What has been your business?

A. Well, up to this year the canning fish industry.

Q. How long have you been connected with the fishing industry?

A. Since seventy-six—thirty-eight years.

Q. What experience have you had—your experience in what parts of the Pacific Coast?

A. On the Columbia River and Alaska.

Q. Have you had any experience with traps?

A. Yes, in Southeastern Alaska.

Q. Fishing for salmon with traps? A. Yes.

Q. And during that long experience—Are you connected at this time with any fishing industry?

A. No, sir.

Q. Any company?

A. No, sir, I am out of the business altogether.

Q. Now, from your experience in the fishing business you became somewhat acquainted, have you not,

(Testimony of T. P. Keegan.)

with the habits of the salmon? A. Yes.

Q. How many species of salmon are there, Mr. Keegan?

A. Well, we have here for commercial purposes five.

Q. Do you know the habits—

A. That is, not counting the steelhead as a salmon.
[247—121]

Q. You have had experience in trapping those five species of salmon? A. Yes.

Q. What is the natural disposition of the salmon when they approach an obstacle as they are on the way to the spawning grounds—an obstacle of the nature of a trap lead?

A. Well, in slack water they work away from it, but if the current is strong, they work against the current, but in slack water or muddy water they will work away from it.

Q. What is the *modus operandi*, if you will explain it to the jury, from the time he first meets the first obstacle until he gets in the heart and from there to the pot; will you describe it so the jury will understand it?

A. Well, striking the lead, it all depends if they are coming in from open water, and striking the lead they will keep on ahead in until they get in shallow water, then probably turn about, follow that lead, likely following into the opening entering into the heart. If the tide is slack, that is, no tide, no current, they will probably play around in the heart, very often turn around and go out again. If the

(Testimony of T. P. Keegan.)

tide is strong, they will work against the web—against the current—work around—and likely work out to the entrance of the tunnel, work in through the tunnel into the pot. In the pot they then, if the tide is still strong—current strong—will work against the tide—against the webbing.

Q. Why do they do that?

A. Well, as far as my idea is, it is their nature to work against it.

Q. Has that any relation to their escape?

A. They will work endeavoring to escape.

Q. Endeavoring to escape?

A. Yes. [248—122]

Q. How wide is the opening usually of traps in the heart?

Mr. FOLSOM.—I object to the question on the ground that it is incompetent, irrelevant, and immaterial. The question is, what are these traps in question.

The COURT.—Objection overruled.

A. It all depends on the idea of the trap operator—from ten to twelve feet, some places eight feet. I have put in some traps myself that had about eight feet.

Q. (By Mr. MUNLEY.) It wasn't a large size trap? A. Yes.

Q. It depends on the size of the trap?

A. Yes, and length of the leads.

Q. What is the purpose of the thing known as the jigger?

A. The jigger will occasionally—fish going along

(Testimony of T. P. Keegan.)

the lead, if they fail to enter the heart, they will work out and strike the jigger and it will cause them to turn and go in again and following along the lead and go into the heart.

Q. Will you explain that—its whereabouts? Assuming this to be the lead, this the heart, this the opening, what would be the jigger? (Indicating.) What would be the jigger and state what constitutes a jigger?

A. The jigger is a row of piles driven with a hook around the end. You drive a row of piling from about here right out, and then you drive a hook around them with piling. Then they wrap the wire netting or webbing around that. That serves as a jigger. (Indicating.)

Q. Would there be any purpose in having the jigger if they always stay in the heart? A. No.

Q. And, as a matter of fact, they don't always stay in the heart? A. No.

Q. As a matter of fact, don't they go in and out a great many [249—123] times before they get in there? A. Yes, a great deal.

Q. Does a trap with a jigger fish better than a trap without a jigger?

A. A trap with a jigger fishes better.

Q. Why?

A. Because when they strike this hook—

Q. By hook, you mean piling?

A. Yes; they strike in towards the lead back into the heart again.

Q. Now, Mr. Keegan, you have told the jury the

(Testimony of T. P. Keegan.)

habits of the salmon fish when he gets into the heart. If the natural tendency is for a salmon to go forward and go along the lead and back again if he is turned by the jigger—if the heart were opened next to the pot to any extent, what would be the effect?

A. The salmon would go out through that opening.

Q. Would he be obstructed in any way there?

A. No.

Q. If there would be no jigger, there would be nothing? A. No.

Q. He would go on his way to the sea?

A. Yes.

Q. From your experience as a trapman and fisherman, what width of opening in the trap would be sufficient to permit a salmon to go through?

Mr. REAGAN.—I object to that as being incompetent, irrelevant, and immaterial.

The COURT.—Objection overruled.

A. Three, four, or five feet—such as that. That would be ample space. [250—124]

Q. (By Mr. MUNLEY.) Have you ever noticed a salmon escape in a very small space?

A. I have noticed a salmon go back through the tunnel in the pot out in the heart.

Q. Have you ever noticed—observed his action when caught? A. They are very wild.

Q. Isn't it a fact that even when the tunnel is only partially turned that they will find the trap empty immediately—not immediately, but as—

A. I didn't understand the question.

(Testimony of T. P. Keegan.)

Q. Isn't it a fact that if a portion of the tunnel were open or all open and the hearts were open next to the pot, would it be a safe proposition to keep the tunnel open?

A. No; there is—very often the tunnel has to be closed when they are in fishing condition, when fish are in the pot. At certain stages of the tide that tunnel must be closed during the fishing days of the week; if not, you will lose a great many of the fish out. I have had that experience myself.

Q. Then these changes occur very frequently?

A. Every six hours.

Q. If a trap were opened in such manner next to the pot as to allow the free passage of salmon, and the tunnel were also open, what would be the result?

A. A great many fish would get out of the pot.

Q. Coming to the spiller—if the tunnel was opened and the web was opened to such an extent that salmon could pass freely, would it affect all of the different impounding devices?

A. They would escape out of the spiller as well as out of the pot at certain stages of the tide. [251—125]

Q. Their tendency as wild animals is to escape?

A. Escape, yes.

Mr. MUNLEY.—That is all.

Cross-examination.

(By Mr. FOLSOM.)

Q. Do you know anything about the defendant's traps? A. No, I do not.

Q. You don't know how they are constructed?

(Testimony of T. P. Keegan.)

A. No.

Q. Did you ever watch traps during the closed season—fish traps?

A. Do you mean during the closed hours?

Q. Yes.

A. In what way?

Q. To watch the effect.

A. No; only with my experience wherever I have been the tunnel was always closed.

Q. You never watched the heart?

A. Yes; last year I had experience; that is, I noticed it last year in Icy Straits.

Q. Taking it altogether, a fish-trap is pretty effective, isn't it? A. Yes.

Q. You don't know whether the defendant has jiggers on their traps or not? A. No, I do not.

Q. There is a considerable difference of opinion as to the efficacy of jiggers among the cannerymen?

A. I don't believe much among cannerymen, but there is among other branches of fishermen like gillmen; of course, they don't like to see jiggers on the traps. [252—126]

Q. The purpose of traps is to catch fish?

A. Yes.

Q. And your acquaintance with cannerymen is that they catch as many fish as they can? A. Yes.

Q. And every device to get fish is used, isn't it?

A. No, not always.

Q. Well, what do they fail to make use of that is effective?

(Testimony of T. P. Keegan.)

A. I can only state from my own experience.

Q. Well, you are testifying now as an expert.

A. That is, can I state as to what I have done when I found that I had more fish than I needed, that is, as to what I had in the traps?

Q. That isn't the question.

A. I didn't understand you.

Q. What device is there that will be more effective in catching fish that isn't generally used in the cannery?

A. There is no other device that I know of.

Q. And the purpose, your purpose when you were in the fish business was to catch all the fish that you could use?

Mr. WINN.—I object to the question as not proper redirect examination. He is asking a few expert questions, now he is coming down—suppose Keegan did, suppose he fished them out of every river. That wouldn't be material in this case and not proper redirect examination.

The COURT.—I don't think it is strictly redirect examination, Judge Folsom.

Mr. FOLSOM.—I think this man is an expert and ought to be allowed to answer the question.

The COURT.—But he can't be allowed to answer every question just simply because he is an expert.
[253—127]

Q. (By Mr. FOLSOM.) Supposing, Mr. Keegan, that the heart wall was lowered just to the water-line and there were fish in the heart, what would become of those fish?

(Testimony of T. P. Keegan.)

A. That is, lowered just to the water-line?

Q. Yes.

A. Well, if the fish got around to that place there and the heavy weight of fish would take it down some so that part would get out,—they wouldn't all get out, but some would get out.

Q. And you understand that the law provides that the heart wall next to the pot should be raised or lowered at a width of twenty-five feet?

A. Yes.

Q. And it was for the purpose of allowing the fish to get out?

A. Yes, to proceed on to the spawning grounds.

Q. The general tendency of the fish is after they once get into the heart or pot is to stay there?

A. No.

Q. More get out than remain in?

A. Oh, they go in and out at different times.

Q. But the sum total is that more remain than get out; isn't that true?

A. That is, where they pass on into the pot.

Q. Isn't it true that more go from the heart into the pot than get into the heart and into the pot and back again? A. Yes, I guess they do, yes.

Mr. FOLSOM.—That is all. [254—128]

Redirect Examination.

(By Mr. MUNLEY.)

Q. Mr. Keegan, I don't know whether you got it before the jury as to what was said in answer to a question on cross-examination in reference to the trap being down to the water-line, the web being

(Testimony of T. P. Keegan.)

lowered to the water-line in the heart next to the pot. I want to ask you if the web were lowered so that it was three to five feet at the water-line in width across from the pot to the lowering stick, what would be the effect—would it allow free passage or otherwise? A. I didn't quite understand you.

Q. Suppose this were like that—this stick like that; suppose the water was five feet across there—would that be free access to salmon fishes? (Indicating.)

A. Yes, as long as the water was above the bottom of the opening.

Q. Suppose there were two, three to five feet there; would salmon coming in here hesitate a minute? A. No.

Recross-examination.

(By Mr. FOLSOM.)

Q. Did you ever see a fish jump over the line—over the rope?

A. Yes, when the webbing was down close to the water.

Q. You have seen them get back a ways and make a jump? A. Yes.

Q. Any others follow him?

A. I haven't noticed that; occasionally they would, but they wouldn't follow like that.

Q. Wouldn't follow the lead like that?

A. No. [255—129]

Redirect Examination.

(By Mr. MUNLEY.)

Q. When it comes to salmon jumping, you have

(Testimony of T. P. Keegan.)

seen some? A. Yes.

Q. Isn't it a well-known fact that they climb very precipitous places? A. Yes.

Q. Isn't it a fact that they climb the falls in some of these large and small rivers? A. Yes.

Q. Isn't it a fact that you have seen pictures where you have seen the salmon jumping over the falls?

Mr. FOLSOM.—I object to the question. He might just as well say he saw them jump trees.

Mr. MUNLEY.—The greatest detective of modern times is the photograph.

The COURT.—That is true, but I have seen photographs of men falling out of balloons in moving picture shows and I know they have never happened.

Mr. MUNLEY.—Well, that is one on me. That is all.

Recross-examination.

(By Mr. FOLSOM.)

Q. You say there are six changes of the tide during the closed period? A. That is, every six hours.

Q. What would be the effect of the fish in the pot during these changes of the thirty-six hours in leaving the heart?

A. You mean—that is, the fish that would be in the pot, what [256—130] would be the effect?

Q. In the heart?

A. That is, with the openings—

Q. Yes; would they—

A. They would pass in and out.

Q. A good many would be liable to stay there, wouldn't they?

(Testimony of T. P. Keegan.)

A. They might, but what I have noticed they would pass in and out.

Q. Well, the heart is merely constructed to keep them in there?

A. No; it is more to lead them into the pot.

Q. The heart is constructed in order to keep them in the heart until they gradually work their way into the pot? A. Yes.

Q. And you don't mean to say that if the webbing was lowered only eight feet from the top that the fish wouldn't remain in there if there was forty feet of water below that line, do you?

A. You mean if the opening extended below the water-line?

Q. Down to the water-line, say eight feet from the capping, and there were fish in the heart, wouldn't they remain there?

Mr. WINN.—We object to the question.

Q. (By Mr. FOLSOM.) Or would they turn around and go out of the heart?

Mr. WINN.—We object to the question because it is not a proper hypothetical question; if he is going to base it on any evidence in the case—

The COURT.—He is cross-examining him on your hypothetical question.

Q. (By Mr. FOLSOM.) What would become of the fish?

A. If that opening extended below the water-line, they would pass out when they got to it. [257—131]

Q. If it extended below *below* the water-line?

A. Yes.

(Testimony of T. P. Keegan.)

Q. If it extended only to the water-line?

A. If it extended only to the water-line, if the fish got in large numbers, the weight would bear it down some so that a good many would go out.

Q. And a good many would remain? A. Yes.

Q. They would keep playing around in the heart?

A. Yes.

Q. And the heart is made for that purpose?

A. Yes, so as to lead them into the pot.

Q. The man who constructed that understood fish and it was constructed to take advantage of the 'fish?

A. Yes, so as to catch fish in an easy way.

Q. And it is like a reservoir to catch fish?

A. Yes.

Redirect Examination.

(By Mr. MUNLEY.)

Q. Would it be possible to impound fish in the heart at all if there was any opening next to the pot whereby they could escape? A. No.

Recross-examination.

(By Mr. FOLSOM.)

Q. Did you ever see any of the fish climb up the web and crawl over? A. No.

Mr. FOLSOM.—That is all.

(Witness excused.) [258—132]

[Testimony of J. P. Nelson, for Defendant.]

J. P. NELSON, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. MUNLEY.)

Q. What is your full name? A. J. P. Nelson.

Q. What is your business? A. Salmon fishing.

Q. How long have you been in the salmon fishing business? A. Since '93—1893.

Q. Twenty-one years? A. Yes, sir.

Q. Where have you operated in the fish business?

A. Puget Sound and Alaska.

Q. How long have you been in Alaska?

A. Three years and one year—some few years on Lynn Canal.

Q. What has been your experience in the operation of salmon traps? A. In what way?

Q. Well, in the operation personally of traps or with the owners?

A. I have always been interested in traps myself.

Q. And at the present time you are interested in some traps? A. Yes, sir.

Q. What, from your experience, is the nature of the salmon fish of the Pacific—are they wary fish or otherwise? A. They are, indeed.

Q. Game fish? A. Game fish, yes.

Q. You have observed in your experience the habits of salmon [259—133] when they meet an obstacle on their way to the spawning ground, and, first of all, you may tell how salmon proceed on the

(Testimony of J. P. Nelson.)

way to their spawning grounds?

A. They usually travel on a flood tide and when they come in contact with the lead sometimes they will turn ashore, but they will invariably turn off shore to deeper water. They follow the lead—it is owing to how the lead is constructed, is my experience, whether or not they follow it very closely; that is, how the tide sets on the lead. From there they travel into the heart, if the tide is so it keeps the fish—running inshore on the lead. They keep quite a ways from the lead.

Q. Why do they do so?

A. They are afraid of it.

Q. Proceed.

A. When they get into the hearts, if the tide is running they usually head for the tide. It is impossible to keep the other way, because they are up against the wire on the lead on the other side, so they always keep their heads towards the tide. From there they gradually work into the pot and sometimes make several or a dozen turns around the heart before they go into the pot.

Q. And what is the nature of their action as they approach the tunnel in the pot?

A. They are always afraid of any dark space such as the tunnel would be with two pieces of webbing coming close together at the mouth and very timid.

Q. Do they run in very readily?

A. No, sir, they do not.

Q. What is the fact, from your observation, with regard to their attempts to get into the pot from the

(Testimony of J. P. Nelson.)

heart; is it a clear [260—134] straight passage—do they run into the heart and circulate a while or is it otherwise?

A. They make several turns around the heart and sometimes a school will go into the tunnel, a third of them, or three or four of them, and part go back.

Q. What is the purpose of the jigger?

A. To prevent salmon from going around the trap, either coming out on the lead or after going into the heart, to turn them on the lead again.

Q. What is the fact as to whether or not the heart alone would impound the fish, or would it impound all the fish unless you had the jigger?

A. I don't think so, that the heart would impound the fish at all; they wouldn't stay in there.

Q. They wouldn't stay in there? A. No.

Q. Could you catch any fish in the heart if there was any opening in the heart next to the pot above low water?

A. Not if sufficient width for them to get through.

Q. What is your idea about a sufficient width?

A. Two or three feet.

Q. How quick would it take to—say deliver several thousand salmon if they were in the heart at the time the lowering sticks were put down?

A. It wouldn't take but a very few minutes.

Q. Why?

A. The reason why is because there is nothing to obstruct—there is no dark place—it is getting out of the dark space in the heart, out to where there is more light, and they will take that very readily to get free.

[261—135]

(Testimony of J. P. Nelson.)

Q. Now, with regard to their action when they get into the pot, does it differ in any way from when they get in the heart?

A. They will gradually get more tame.

Q. What, then, is their attitude or their conduct—direction in regard to the walls?

A. They follow the walls of the trap, particularly on the flood side, looking for an avenue of escape.

Q. Do they ever get out of the tunnel again, from your observation? A. Yes, sir, quite frequently.

Q. Would it be safe practice where there was any opening in the heart next to the pot to open the tunnel into the heart? A. No, sir.

Q. What would be the result?

A. We would lose a lot of fish with nothing to turn them back.

Q. From your experience, what is the general opening to the trap? A. Fourteen feet.

Mr. REAGAN.—How was that?

Q. I asked him as to the practice in the width of opening in traps in this locality. You said fourteen feet. Now, suppose it was a double-heart, or a heart that fished from both sides; what would be the opening then?

A. We have a regular rule for that, twenty-four feet on the outside lap of the heart.

Q. (By Mr. MUNLEY.) That would be twelve on one side?

A. No; twenty-four on one side and fifteen on the side where we catch the least number of fish.

Q. Then altogether there would be an opening in

(Testimony of J. P. Nelson.)

such double-heart something like thirty-six feet—the entrance from the lead? A. Yes, sir.

Q. With such an opening as that and with the hearts open to any [262—136] sufficient extent to permit the free passage of salmon next to the pot, would it be possible to impound salmon in the heart?

A. No, sir.

Q. What would be the tendency?

A. They would escape.

Q. How about with reference to the tides; do they fish at all tides? When I say fish, I mean do they run into the trap? A. No.

Q. What tide is usually considered the best tide for fishing? A. Flood tide.

Q. Do they fish at slack tide?

A. Sometimes traps will fish with a slack tide.

Q. At low tide?

A. When the tide begins to flood.

Q. Do they ever fish on an ebb tide?

A. No, I have never been successful to fish on an ebb tide.

Mr. MUNLEY.—You may take the witness.

Cross-examination.

(By Mr. FOLSOM.)

Q. Where did you do your last fishing?

A. In Icy Straits.

Q. When? A. This season.

Q. Are you personally a fish-trap man, or do you work for or represent a company?

A. I am superintendent, fishing fish-traps.

Q. You are very much interested in this case?

(Testimony of J. P. Nelson.)

A. I am. [263—137]

Q. You and your company also have an indictment here? A. Yes.

Q. You say that the salmon is rather a wary fish; is that true? A. Yes.

Q. He isn't as wary as the canneryman that is trying to catch him?

Mr. MUNLEY.—That is kind of a smart question.

Mr. FOLSOM.—I think it is all right, if the Court please, because this witness by his testimony wants the jury to believe that there are more fish get out of the trap than get in and I want to show that the wiles of the canneryman are such as to catch those fish. I think that is the reason that the providers of the law provide that twenty-five feet—

The COURT.—Yes, but that doesn't depend upon whether the canneryman is smarter than a fish. The objection is sustained.

Q. (By Mr. FOLSOM.) How many flood tides are there in the weekly closed season?

A. There are about six.

Q. Six? A. Almost six.

Q. And there are six tides during the weekly closed season when it is the best fishing time, aren't there? A. Yes.

Q. And after all—

A. There are not six; I think you are mistaken about the tide—there are three ebbs and three floods—those are the tides. It constitutes an ebb and flood to make a tide, as I understand it.

Q. After all is said and done, the trap as used is a

(Testimony of J. P. Nelson.)

pretty successful fish trapper, isn't it? [264—138]

A. Some of them are.

Q. They are constructed to catch fish?

A. We aim to catch fish.

Q. If there are fish come along in that vicinity, you catch them? A. Not always.

Q. Now, Mr. Nelson, suppose that the fish, or some of the fish, should get out of the heart, the jigger would intercept them, wouldn't it?

A. Some of them, yes.

Q. And that jigger is for the purpose of turning them back into the heart? A. Yes, sir.

Q. And they are just as apt to be turned back in the weekly closed season as they are at any other time?

A. They don't go into the hearts in that season; they go out the opening prescribed by law.

Q. Don't they get into the hearts exactly the same way in the closed season? A. Yes, sir.

Q. The fish don't take any recognition of the closed season; their habits are the same during the closed season as they are at any other time?

A. Yes, sir.

Q. If they should happen to get out of the heart and run up against the jigger and the jigger would guide them back in the heart—

A. There is very few of them get out that way during the closed season, because they can get through the opening that is left for them.

Q. That depends on how much opening there is?

A. Well, yes—three or four feet. [265—139]

(Testimony of J. P. Nelson.)

Q. If the heart is raised or lowered twenty-five horizontally next to the pot, of course, they would get away? A. Yes.

Q. What become of the fish that are in the heart below the water-line?

A. All fish are below the water-line; they are in the heart.

Q. Say that you lower your webbing—say down to the water-line at that stage of the tide—fish in the heart, what becomes of him?

A. He would remain there or go out the way he come in until the tide would raise sufficient to let him go out.

Q. Supposing it was just down to the high tide line, what would become of him?

A. He would have to stay there or get out the way he come in.

Q. And very few get out of the heart?

A. Unless they jump out.

Q. And as a matter of fact, the heart is a very good fisher? A. No, it is not good to retain them.

Q. But it does retain a good many of them?

A. They gradually work out in time.

Q. *That* there weren't any fish remaining in the heart during the closed season? A. No, sir.

Q. Doesn't make any difference what the stage of the tide is?

A. No, they won't stay in there thirty-six hours.

Q. If the tunnel was left partially open and the walls of the heart were lowered, wouldn't some of the fish go through that tunnel into the pot?

(Testimony of J. P. Nelson.)

A. No, they would go out where the parts were lowered.

Q. Irrespective of tidal conditions?

A. Irrespective of tidal conditions, if it was lowered sufficiently [266—140] below the water so that they could get out.

Q. What was the purpose of providing for closing the tunnel; was that an idle provision?

A. That was, I presume, to keep the fish from going in—as an extra precaution so that they couldn't get in.

Q. But the probability of their going in would be very slight?

A. They wouldn't go in if they had the opening in the heart to get out.

Q. They would seek that first?

A. They would.

Mr. FOLSOM.—That is all.

Redirect Examination.

(By Mr. MUNLEY.)

Q. As a matter of fact, Mr. Nelson, would the trap fish if the tunnel were closed although the heart were all closed; suppose the heart was all closed but the tunnel were closed, would the trap catch fish?

A. They would go into the heart.

Q. But they wouldn't be caught, would they?

A. No.

Q. Suppose the tunnel would be opened and the hearts would be opened, would it fish?

A. You mean the webbing let down?

Q. Yes. A. No.

(Testimony of J. P. Nelson.)

Q. What would be the effect?

A. They would take the opening in the heart first.

Q. Would it be a greater risk to have a combination of such conditions than it would be to have the tunnel closed?

A. I would prefer to have the tunnel closed when the hearts [267—141] were down.

Mr. MUNLEY.—That is all.

Recross-examination.

(By Mr. FOLSOM.)

Q. To prevent catching fish?

A. To prevent them escaping.

Redirect Examination.

(By Mr. MUNLEY.)

Q. Mr. Nelson, did you ever observe the low tide to extend over the thirty-six hours during the closed season? A. I don't understand the question.

Q. Did you ever see it low tide all the time during the closed season? A. No, sir.

Recross-examination.

(By Mr. FOLSOM.)

Q. You never saw it high tide either, did you?

A. No, sir.

Mr. FOLSOM.—That is all.

(Witness excused.) [268—142]

[Testimony of Rolla Davis, for Defendant.]

ROLLA DAVIS, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. WINN.)

Q. Mr. Davis, you are in the fishing business too, are you? A. Yes, sir.

Q. What cannery have you been running in Alaska for the last couple years or so?

A. The Tee Harbor Packing Company.

Q. At Tee Harbor? A. Yes, sir.

Q. Have you ever followed trap fishing to any extent in connection with the fish business?

A. Yes, sir.

Q. Did you ever fish on Puget Sound?

A. I fished on Puget Sound.

Q. How long have you been engaged in the business? A. Since 1895.

Q. Now, Mr. Davis, without asking you a lot of questions, I wish you would just briefly state about the manner of fish working their way into the heart and their actions and habits, etc.; just briefly explain what you observed.

A. Well, when the flood sets—we try to catch fish the way this trap is now situated, so that the flood tide is coming from there and if the tide is coming more—what we call on the front of the pot there, from that angle, and fish hit the lead, they will immediately work up here; that is, immediately, I mean in time as they swim around. They begin to head with the tide and the thing is reversed around—as

(Testimony of Rolla Davis.)

the tide comes off the beach in this direction they will likely come [269—143] up here toward the opening and as the tide slacks a great many work out, but nearly all trap men set traps so the tide will hold them up there to force them into the tunnel. (Indicating.)

Q. What about the rise and fall of the tide about the fish remaining in the heart, or are they apt to find their way out the way they got in? Explain that.

A. When the tide comes slack, so there is no direct current to buck against, they play around and around in there and if it comes in this way, they find a stream of water, water in here, and comes working out—perhaps a dozen might come out out of a thousand. It would empty itself out if the tide should run off-shore, that is, this part of the lead. It would empty out the heart. (Indicating.)

Q. Out of the heart?

A. Yes, sir, on this side.

Q. Now, Mr. Davis, suppose between the closing hours as laid down in the statute, you know what they are,—if the mouth of your tunnel which leads from the heart into the pot should be closed during that season, how much of a space, in your judgment, would be necessary for the heart to empty itself near the pull-down sticks, or closing sticks?

A. That would be according to the action of the current; suppose the tide was coming in here and they worked up here and found a fresh stream of water there; this water is dead where the webbing is, more dormant back here, until it comes to an open-

(Testimony of Rolla Davis.)

ing and then they work right along a continual stream and go out. I have seen them go through very small spaces. If the tide is slack, it takes a larger space, because the water is more dormant back here—there in the hearts. (Indicating.)

Q. What space under the circumstances, in your judgment, would [270—144] furnish free passage for salmon and other fish, referring to the space down near the mouth of the tunnel that leads into the pot from the heart?

A. Well, three or four—four or five should clear the trap readily enough. Any amount would go out—when the long shove-down, the weight of the web pulls the web down so that there is a bend in it, because it is fastened at the top and fastened at the bottom.

Q. You have seen them go through a very small space?

A. Yes; it is spread out—if there was a large number of fish, it would take a larger amount of space.

Mr. WINN.—That is all.

Cross-examination.

(By Mr. FOLSOM.)

Q. You spoke about a fresh stream of water running out; do you mean to imply that the fresh stream of water does the same as a fish does and finds this opening to run through?

A. No, but they seek that opening. When I say fresh water, I don't mean fresh water—I mean salt water.

Q. You don't mean that the fresh water follows

(Testimony of Rolla Davis.)

the lead the same as a fish itself? A. No.

Q. All around the heart—

A. There is a channel through there for the—it is wire or cotton, as the case may be, and the meshes between clog with seaweed that way and it makes a dead space of water inside the hearts.

Q. You mean to say that under those conditions that you have described, that the water only runs out through these openings in the heart wall? [271—145]

A. No, sir, I do not, but I mean it runs more rapidly there and with a greater amount of force than it does through the wire.

Q. You are very much interested in the result of this case? A. I am, vitally.

Q. Because you have one of the same?

A. Yes, sir.

Q. Your traps are constructed in the same way as the defendant company's traps?

Mr. WINN.—We object to the question. It is not proper cross-examination. It has already been elicited from this witness that the defendant company has traps and we have never questioned him about his traps. We have simply asked him about fish going in and out and not any particular traps.

Mr. FOLSOM.—The witness has been introduced here as an expert witness and I want to know if theirs are a different kind of trap.

Mr. WINN.—That is a question that concerns the trial of their case.

The COURT.—Why don't you object on the

(Testimony of Rolla Davis.)

ground that it might incriminate him?

Mr. WINN.—I object.

The COURT.—Objection sustained.

Q. (By Mr. FOLSOM.) Have you ever watched the fish in the heart, Mr. Davis?

A. A great many times.

Q. Do you mean to say that no fish will remain in the heart if the walls are lowered down say to the water level at that stage of the tide?

A. At that stage of the tide—I think they would stay there at that stage of the tide. [272—146]

Q. Suppose it is lowered down to one-half tide, will the fish remain in there?

A. I don't quite get your question, Mr. Folsom.

Q. Well, you mean to say if the heart wall was lowered to low tide, there would be no fish in there at all?

A. No, I do not mean to say that—you said the water-line. You mean the low-tide line?

Q. Yes, down to the low-tide line.

A. I think whatever fish were in that heart below the low-tide line would remain there until the tide started to raise.

Q. You think, then, they would all go out?

A. Yes, sir.

Q. Supposing that the web of the heart walls was at high tide lowered to just that point?

A. Well, fish are in where they are in the water. They are below the line of the webbing.

Q. Then they would remain there?

A. They certainly would, if there was no egress for them.

(Testimony of Rolla Davis.)

Q. Did you ever see any fish-traps where twenty-five feet of the webbing was lowered to the bed of the sea or raised up to the high-tide line?

A. I can't say that I have.

Q. Did you ever see twenty-five feet of the heart-walls lowered to the bed of the sea?

A. I can't say that I have.

Q. During the weekly closed season, did you ever see twenty-five feet of the heart wall lowered to the bed of the sea?

A. I can't say that I have.

Q. Or raised above the high tide?

A. I can't say that I have.

Q. Did you ever see the heart wall next to the pot lowered horizontally twenty-five feet, lowered at all any distance? [273—147]

Mr. WINN.—I object to the question on the same ground as before, that this witness will be a witness in his own case and whether it would incriminate him or not, it is taking unfair advantage of Mr. Davis.

Mr. FOLSOM.—It isn't for that purpose at all; eliminate Mr. Davis altogether.

The COURT.—I think so, Judge Folsom,—How could he do that—eliminate him? You said, "Did you ever see it."

Mr. FOLSOM.—I say, exclude his own traps.

The COURT.—You cannot exclude it when the question is: "Did you ever see it."

Mr. FOLSOM.—I am not talking about his own traps at all,—anybody else's traps.

The COURT.—If you put it that way, I cannot

(Testimony of Rolla Davis.)

see how it would incriminate him.

Mr. WINN.—If he—

Mr. FOLSOM.—We excepted his traps all the time.

The COURT.—Q. Excluding your own traps, did you ever see a trap of anybody's else's except yours—
Read the question.

(Q. read by stenographer:) Did you ever see the heart wall next to the pot lowered horizontally twenty-five feet, lowered at all any distance?

The COURT.—Q. Not your traps — anybody's else's?

A. Not that I can swear to.

Q. (By Mr. FOLSOM.) The traps are constructed to catch fish?

A. That is the prime object.

Q. And catch as many as you possibly can?

A. That is what I do.

Q. And the trap as constructed is pretty effective?

A. It is in certain waters. [274—148]

Q. Do you agree with Mr. Nelson that the salmon is a wary fish? A. Yes, sir.

Q. The fact of the case is, that the ordinary fish leaves all hope behind when he gets into the heart, doesn't he?

A. Not necessarily so, Mr. Folsom.

Mr. WINN.—That is a psychological question.

The COURT.—No, I should say that was poetical.

Redirect Examination.

(By Mr. WINN.)

Q. Usually, Mr. Davis, in the construction of a

(Testimony of Rolla Davis.)

trap, ordinarily, in general cases, about how deep is the water where the lead intersects the heart?

A. At high or low water?

Q. Say low water.

A. I would say generally it runs from thirty to thirty-five feet. It largely depends upon the ground; some ground is more steep than others.

Q. How deep is the water down here where fish leave the heart and go into the tunnel from the pot?

A. It is probably ten or fifteen feet deeper. It depends on the slope of the ground. The distance from the capping is fifty or sixty feet to the tunnel stake and this ground is more or less abrupt here—very few deep places.

Q. How much deeper would you say it was?

A. There are probably thirty feet more. [275—149]

Recross-examination.

(By Mr. FOLSOM.)

Q. About what depth of water do you generally seek to have your pot and spiller in?

A. Well, Judge, we generally put our patent spiller in just whatever depth we can get it to so as not to exceed seventy-five feet at the hearts. Sometimes the inside wall may be seventy-five feet of water and the outside might be a hundred feet.

Q. What is the average length of the piling, that is, just next to the pot in the heart? What would be the average length of the heart piles?

A. I have driven about sixty-five or seventy feet.

(Testimony of Rolla Davis.)

Q. And that is about the depth you cannerymen like to get?

A. We would like to get shallower than that, but that is what we are forced to do here.

Q. I will ask you about how much higher is the lower part of the tunnel than the bottom of the heart?

A. That would depend entirely upon the depth of the water; the bottom of the heart goes to the bottom of the bay and the bottom of the pot goes about forty feet. I use sixty feet, while some people use forty feet.

Q. There is some proportional feet?

A. Only the difference between thirty-six and seventy, whatever that might be.

Q. Does the bottom of the pot and the spiller come down as low as the bottom of the heart?

A. No, sir.

Q. About what would be the difference?

A. I just stated that if the heart was seventy feet and the pot forty, there would be thirty feet of difference. [276—150]

Q. Then you have an apron dropped down from the bottom of your pot and spiller so that the fish cannot get out from the heart?

A. From the pot, no, Mr. Folsom.

Mr. FOLSOM.—That is all.

(Witness excused.)

(Whereupon the jury was admonished and Court adjourned until 10 A. M., October 30, 1914, when Court reconvened pursuant to adjournment.)

The COURT.—Call the jury.

(Clerk calls jury and all answer present.)

The COURT.—Proceed, gentlemen.

Mr. WINN.—We rest, your Honor.

The COURT.—Any rebuttal?

Mr. REAGAN.—We had some rebuttal; Mr. Walker is out now to bring in some witnesses. I didn't think the other side would end so abruptly.

The COURT.—You knew there was a possibility that they would close.

Mr. REAGAN.—We would like to have Mr. Walker here at least.

The COURT.—How long will it take to get Mr. Walker?

Mr. REAGAN.—I will send right away after him, if the Court please.

The COURT.—Ten minutes?

Mr. REAGAN.—Maybe; we will try it.

(Whereupon the jury was admonished and excused until 10:30 A. M. the same day, when Court reconvened pursuant to adjournment.) [277—151]

The COURT.—Let the record show that the jury is present. •

Mr. REAGAN.—We rest.

The COURT.—Proceed with the argument.

Whereupon M. G. Munley and Winn & Burton, attorneys for the defendant in all of said cases consolidated, numbered 1034-B, 1035-B and 1036-B, offered, tendered and requested the Court to give to the jury the following instructions: [278]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Instructions [Requested by Defendant].

INSTRUCTION NO. 1.

Gentlemen of the Jury, this is a criminal case consisting of three indictments against the defendant, and each indictment containing two or more counts or charges, each countercharge claiming on the specific date mentioned therein that the defendant violated the fishing laws of Alaska by reason of maintaining and operating certain fish-traps and failing to, in some instances or some of the counts, to raise or lower the web of that part of the trap known as the heart, as required by law, and in other counts charging this last matter and also the failure to close what is known as the tunnel leading from the heart of the trap to the pot, as required by law. It is necessary for the Government to prove these facts last mentioned beyond a reasonable doubt before you would be justified in finding the defendant guilty of any one or more of the counts contained in the three indictments referred to herein. And should the Government fail to prove to your mind

beyond a reasonable doubt that the facts mentioned herein are true, then, it is your duty to acquit the defendant.

INSTRUCTION NO. 2.

I also instruct you, Gentlemen of the Jury, that the purpose and spirit of the law is to protect salmon so that they may not be obstructed in their passage to their spawning ground during the weekly close season. Unless the Government in this case prove to your mind beyond a reasonable doubt that the web [279] of the heart of any trap described in any of these various indictments or various counts was not raised, opened or lowered in such a manner as to permit the free passage of salmon or other fishes to escape and go to their spawning ground, then, it is your duty to return a verdict of "Not Guilty" herein.

INSTRUCTION NO. 3.

The statute provides that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such a manner as to permit the free passage of salmon or other fishes during the weekly close season. As a matter of fact if you find in any of the cases or charges against the defendant, that 25 feet of the webbing of the heart was so lifted or lowered to permit the free passage of salmon or other fishes, your verdict must be for the defendant, and, in this connection the statute does not mean that 25 feet of the heart of a trap must be raised or lowered vertically; if 25 feet of the webbing is lifted or lowered in a "V" shape but yet in such manner as to permit the free passage of salmon and

other fishes such opening is a sufficient compliance with the statute and your verdict must be for the defendant.

INSTRUCTION NO. 4.

The language of the statute is, that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. That does not mean 25 feet square or that 25 feet must be torn out of the sides of the heart every weekly close season. Any manner of lowering or lifting 25 feet of the heart so as to permit the free passage of salmon and other fishes so that they may go on through the trap to their spawning grounds is sufficient. And if you find as to any of the charges in these indictments that the heart of any [280] trap was so lifted or lowered or opened, your verdict must be for the defendant.

INSTRUCTION NO. 5.

I instruct you that the right of fishing, or of fishery, as it is called, is common and free to every citizen. The Government has, however, the power to regulate and restrict it. This right to free fishing can only be limited or taken away just as far as any such regulations go; and, therefore, the regulations regarding salmon traps during the weekly close season established by the Government cannot be extended or expanded beyond their strict meaning. The statute says that:

“Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and

twenty-five feet of the webbing or net of the 'heart' of such traps on each side of the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes."

Unless the language of the statute itself provided that twenty-five feet of the heart on each side next to the pot should be lifted or lowered from the top to the bottom of the heart, it would be adding to the statute to say so.

You must consider the law as it is. You must determine from the evidence whether 25 feet of the web of the heart on each side of the pot was lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If you find that it was so lowered or lifted in any of the charges against this defendant alleged in the various indictment you must acquit the defendant.

The Court refused to give said instructions and each and all of them, to which said refusal and ruling of the Court the defendant, by its attorneys, excepted and exception was allowed. [281]

(Argument by Mr. Folsom and Mr. Munley.)

(At 12 A. M. The Jury was admonished and court adjourned until 2 P. M., the same day when court reconvened pursuant to adjournment, the jury and all counsel being present.)

(Resumption of argument by Mr. Munley.)

(Argument by Mr. Winn and Mr. Reagan.)

Whereupon after the argument of said case to the jury, the Court instructed the said jury as follows, to wit: [282]

INSTRUCTIONS TO JURY.

The COURT.—Gentlemen of the Jury: This lawsuit between the Government of the United States and the Thlinket Packing Company is being tried before you and me. You are the jury and I am the judge—it takes both you and me to make the Court. I have certain functions prescribed by the law and you have certain functions prescribed by the law. It is a good thing, and the law commands that I do not interfere with your functions, and that you do not interfere with mine. The law says just what your functions are and it says what my functions are and it says when you perform your functions and I perform my functions, the object and end of the law will be fulfilled.

So you see, it is just as important for you to do your duty as it is for me to do my duty. Now, the law says, and this is not just talk—it is the law—the law says that the jury are bound to receive as law what is laid down as such by the Court, but that all questions of fact must be decided by the jury and all evidence is addressed to them. Now, those are not mere sounds—they are words in the English [283—152] language. They are words that live and breathe and throb and have a meaning and stand up and look you in the face, and look the counsel in this case in the face, and they look me in the face, and they look everybody in the face, and they say: That is what I said and that is what I mean—that the Court tell the jury what the law is and the jury find the facts from the evidence.

Now, in every case, gentlemen of the jury, there

are important things and there are unimportant things, and it is your duty, just as it is my duty, not to magnify the unimportant things, and not to minimize the important things. So far as my functions are concerned, the important thing for me to decide is what I think the law is, and so far as your functions are concerned, the important thing for you to decide is: What does the evidence show.

It is not a matter of any importance in this case what a man by the name of Bower may have interpreted this law to be. It is not a matter of importance in this case, so far as my functions are concerned, how a man named Cobb may have interpreted this law. It is not a matter of importance how the Department itself may have interpreted this law. It is a question of what I think the language—what I think this law means, and whatever I think it means and what I tell you it means, you must accept as the law of the case.

Now, the indictment in this case is drawn under a certain section of the statute—I will read you that section:

“Throughout the weekly closed season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.”

Now, I will tell you, gentlemen, what I think that [284—153] section means and, first, I will say that I

think it means just exactly what it says. I don't think there is a superfluous word in that section, nor a word that doesn't express its meaning. Now, let us see: "Throughout the weekly closed season herein prescribed"—The statute has just prescribed that from six o'clock Saturday afternoon to six o'clock Monday morning is the weekly closed season. Now, it says: "Throughout the weekly closed season herein prescribed—(that is the time now)—the gate, mouth or tunnel"—some people call it a gate, some call it a mouth, some call it a tunnel, so it says: "The gate, mouth or tunnel of all stationary and floating traps"—some traps are stationary and some floating, evidently, but the section takes them both in—"of all stationary and floating traps shall be closed *and*—(it doesn't say *or*)—twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes." Now, let us see—it wouldn't do to say that some of the net or webbing shall be lowered, unless the statute says how much shall be lowered, so the statute says twenty-five feet of the webbing or net shall be lowered or raised. If the statute stopped there, it would not be definite, because it wouldn't say what part of the webbing of the heart of the fish-trap, so it is going to be definite about that, so it says: "twenty-five feet of the webbing or net of the heart of such trap." That wouldn't be definite if it stopped there, because the heart of a trap has two sides, so it says, in order to make that definite: "Twenty-five feet of the web-

bing or net of the heart of the trap on each side”—each side means both sides, consequently—“twenty-five feet of the webbing or net of the heart on both sides”—that wouldn’t be definite if it stopped there, because [285—154] the heart extends over some little distance—“what part of the heart?”—Then it says: “The heart next to the pot.” What is to be done with it, this twenty-five feet of the webbing of the heart next to the pot on both sides of the heart—what is to be done with it”? It shall be lifted or lowered.” Now, there is the conjunction “or”—either one, either lifted or lowered. Is that the end of the section? No. It not only says twenty-five feet of the webbing of the heart next to the pot on each side be lifted or lowered, but that twenty-five feet must be lifted or lowered in a certain way or to accomplish a certain end and so it says that it must be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

Now, that is a positive command, gentlemen, that twenty-five feet of the net of the heart next to the pot shall be either lifted or lowered, twenty-five of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that that twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide that window-pane in two parts. Suppose that window-pane were actually in two separate parts, so that each part could be lowered or

raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating.) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way—I am asking you to raise or lower it. Now, twenty-five feet [286—155] of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of the twenty-five feet.

Now, gentlemen, that is all there is in this case. That is the law of this case as I understand it. Now, the facts in the case are for you to pass on. Has the Government proven to you beyond a reasonable doubt that twenty-five feet of the webbing of the heart on both sides next to the pot have not been raised or lowered in such a manner as to permit the free passage of salmon and other fishes? If the Government has proved that to you beyond a reasonable doubt, it is your duty to convict on each and every count, if that has been the proof on each and every count. If the Government has not proven that to you beyond a reasonable doubt, it is your duty to acquit.

Reasonable doubt does not mean beyond any and all doubt. It does not mean that you are to conjure

up doubts and by strained constructions make doubts for yourself—it means when you take all the testimony in the case— When you take all the facts and circumstances of the case—if you are convinced—if you are satisfied to a moral certainty, with that degree of conviction that would lead you to act on the important affairs of life, then you are said to be satisfied beyond a reasonable doubt.

You are the sole judges of the credibility of these witnesses. You must consider what they testified to—you must consider their demeanor and appearance on the stand, their candor or lack of candor, their ability to know the truth and their disposition and their inclination to tell the [287—156] truth. You must take into consideration and you may take into consideration what interest, if any, has been shown by the testimony that they had in the case. You may take all these facts into consideration and make up your mind as to whom to believe and what you will believe, what he testified to, just about in the same way as you make it up in the everyday affairs of your life.

Now, gentlemen, there are three indictments in this case. In each indictment there are more than one count. The law provides that these three indictments may be all tried as one case, although the verdict that you bring in will be a separate verdict in each case, that is to say, numbered separately. You may take these indictments 1034-B, 1035-B, and 1036-B, and you will consider the counts in every indictment. If you find the defendant guilty beyond a reasonable doubt on all the counts in all the indictments, then your verdict in each case

would be guilty as charged. If you find that the defendant is not guilty of any violation as set forth in any count of any indictment, then your verdict would be: "We find the defendant not guilty," and sign the verdict. If you find the defendant guilty of some of the counts in the first indictment, but not guilty of certain other counts in that indictment, you find him guilty of count so and so and not guilty of the other counts in that indictment, and the same way with the other two indictments.

Now, gentlemen, you have nothing to do, and I have nothing to do, with whether fish-traps decimate the fish or not. You have nothing to do and I have nothing to do with whether the defendant is a foreign corporation or a domestic corporation, or whether it is a corporation at all. The personality of the defendant makes no difference to you and should not make any difference to anybody who has any function [288—157] to perform in meting out justice or seeing that the law is fulfilled. It isn't a question of personalities—you have nothing to do with that question—and you have nothing to do, as I told you before, with the question as to whether some other inspector has passed these traps or not. You have only to do with this: "Does the evidence show beyond a reasonable doubt that this defendant at the time specified did not raise or lower twenty-five feet of the webbing of the heart next to the pot in these traps in such a way that the salmon might have free and unobstructed passage through that trap or through that part thereof."

(Bailiff sworn.)

Mr. WINN.—I suppose this trap goes in.

Mr. REAGAN.—The exhibits don't as a rule go in.

Mr. WINN.—I understand they always go in.

The COURT.—The statute doesn't say the exhibits shall go in, but do you insist on the trap going in?

Mr. WINN.—Yes, sir, I do.

The COURT.—Gentlemen of the Jury, the Court will adjourn and convert the courtroom into a jury-room.

Mr. REAGAN.—It is very easy to remove it.

Mr. WINN.—We want to dictate some exceptions into the record.

The COURT.—Just a moment. I will send the jury to the jury-room. Get another bailiff and have the fish-trap moved in there. (Jury retires.)

Mr. WINN.—We ask an exception to the refusal of the Court to give instructions numbered one, two, three, four and five as offered to the Court. We also wish an exception to your Honor's instruction and illustration that you made referring to the raising and lowering of the webbing of the heart, especially the comparison made in referring to [289—158] the window and when you *complete* illustrate your definition of what you mention about raising or lowering the webbing of the heart on each side of the tunnel.

The COURT.—Very well; exception allowed.

(Whereupon Court adjourned until 10 A. M., October 31, 1914, subject to the action of the jury.)

At about 5 o'clock P. M. October 30, 1914, the jury

returned into court; whereupon the following proceedings were had:

The roll of the jury was called; each juror answered to his name.

The COURT.—Gentlemen of the jury, have you agreed upon a verdict?

FOREMAN OF THE JURY.—We have.

The COURT.—Hand it to the bailiff.

Bailiff takes the verdicts and hands them to the Court, who opened the verdicts and handed them to the clerk.

FOREMAN OF THE JURY.—Judge, is there any way we can modify that?

The COURT.—You mean you want to ask for the mercy of the Court? Is that it?

Mr. GABBS.—Yes, that is it. We think that while the defendant has violated the letter of the law it has not violated the spirit of the law.

The COURT.—Well, if you wish, you may insert in your verdict, “With recommendation to the mercy of the Court,” if you have agreed upon that.

Mr. GABBS.—We have.

The COURT.—Then you may sit here and insert it right in the verdict.

The FOREMAN.—Would the word “clemency” be the same thing?

The COURT.—Yes.

Whereupon the clerk read the verdicts and defendant’s attorney, Mr. Winn, requested thereupon that the jury be polled. Thereupon the clerk polled the jury, in each case separately, asking each juror individually, “Is this your verdict?”—each juror an-

swered "Yes, it is."

The COURT.—Mr. Gabbs, as foreman of the jury, you will make the statement you made to me a while ago.

Mr. GABBS.—We agreed that the defendants were found guilty as charged, but thoroughly believe that they have erred in the letter of the law and not in the spirit of the law.

The COURT.—Very well—let the record show that.

Mr. WINN.—Your Honor please, under that statement made (to save the record) by the foreman of the jury, we object to the receiving and filing of these verdicts as the verdict of the jury.

The COURT.—Let the record show that.

(Jury excused; whereupon the Court adjourned until 10 A. M. the following day.) [290—159]

That the verdicts rendered, received and filed in said cases numbered 1034-B, 1035-B and 1036-B are as follows, to wit:

United States of America,
District of Alaska.

*In the District Court of the United States for the
District of Alaska, Division Number One.*

1034-B.

THE UNITED STATES OF AMERICA,

vs.

THLINKET PACKING COMPANY, a Corporation.
tion.

. Verdict.

Special August Term, 1914.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment with recommendation for clemency of the Court.

Dated, Juneau, Alaska, Oct. 30, 1914.

A. A. GABBS,
Foreman.

United States of America,
District of Alaska.

*In the District Court of the United States for the
District of Alaska, Division Number One.*

1035-B.

THE UNITED STATES OF AMERICA,

vs.

THLINKET PACKING COMPANY, a Corporation.

Verdict.

Special August Term, 1914.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment with recommendation for clemency of the Court.

Dated, Juneau, Alaska, Oct. 30, 1914.

A. A. GABBS,
Foreman. [291]

United States of America,
District of Alaska.

*In the District Court of the United States for the
District of Alaska, Division Number One.*

1036-B.

THE UNITED STATES OF AMERICA

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Verdict.

Special August Term, 1914.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment with recommendation for clemency of the Court.

Dated, Juneau, Alaska, Oct. 30, 1914.

A. A. GABBS,

Foreman.

That thereafter and within two days from the signing, rendition and filing of each of the above verdicts, the following Motion for New Trial was served and filed herein: [292]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B—Consolidated.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Motion for New Trial.

Comes now the above-named defendant, by its attorneys, M. G. Munley and Winn & Burton, in each of the above-entitled numbered causes consolidated, and feeling itself aggrieved herein, moves the Court to set aside each and all of the verdicts rendered in said causes No. 1034-B, 1035-B, 1036-B, against the said defendant in each of said causes and filed in this court on the 30th day of October, A. D. 1914, for the following reasons and following causes materially affecting the substantial right of said defendant.

First. Irregularity in the proceedings of the Court and jury and order and orders of the Court made at the time and upon the reception of the verdict herein, and abuse of discretion of the Court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the Court and jury, and rulings and orders of the Court so made, showing such abuse of discretion will more particularly appear by the

affidavits of A. A. Gabbs, Z. M. Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached, and the stenographic report of the rulings, orders and actions of the Court at the time and upon receiving and filing the verdicts herein.

Second. Insufficiency of the evidence to justify the aforesaid verdicts and each and all of them rendered in the above-entitled causes consolidated, and said verdicts and each [293] and all of them are against law.

Third. Error in law occurring at the trial and excepted to by the defendants.

WINN & BURTON,

Attorneys for Defendant. [294]

That the affidavits and stenographic report referred to in said Motion for New Trial as being attached to said Motion, is as follows, to wit: [295]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
tion,

Defendant.

United States of America,
Territory of Alaska,—ss.

**Affidavit [J. R. Homer et al., in Support of Motion
for New Trial].**

J. R. Homer, Wallis George, Z. N. Bradford, D. W. Fales and Charles H. Hall, each for himself being first duly sworn on oath deposes and says: That I was one of the members of the trial jury in the above cases. Upon entering the courtroom to report on our verdict, after the jury had responded to the roll-call, the question was asked by the judge as to whether the jury had agreed on the verdict, and the foreman, A. A. Gabbs, declared that we had, and asked the judge in open court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The judge asked as to what recommendation or qualifications we wanted, and the foreman thereupon made the statement that, while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement," or words to that effect, and then, speaking towards the jury Judge Jennings, said, "What you mean [296] is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect.

Thereupon in the open court, the foreman wrote in each verdict a recommendation for clemency of the Court, and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to said foreman of the jury, said, "Now you may make the statement you did on bringing in your verdict," or words to that effect, and the foreman repeated substantially his original statement to the Court.

J. R. HOMER.

WALLIS GEORGE.

Z. M. BRADFORD.

D. W. FALES.

CHARLES H. HALL.

Subscribed and sworn to before me this 31 day of October, A. D. 1914.

NEWARK L. BURTON,

Notary Public for Alaska,

My commission expires November 8, 1917. [297]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
Defendant.

Affidavit [of A. A. Gabbs in Support of Motion for New Trial].

A. A. Gabbs, being first duly sworn, on oath deposes and says: That I acted as foreman of the trial jury in the above cases. Upon entering the courtroom to report on our verdict after the jury had responded to the roll-call, the question was asked by the judge as to whether the jury had agreed on the verdict and I, as foreman, declared that we had, and asked the judge in the open court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The judge asked as to what recommendation or qualifications we wanted, and I thereupon made the statement that while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law and wanted to recommend leniency. At that time Judge Winn arose and asked for a court stenographer as he wanted a record of that statement, and Judge Jennings refused to call a stenographer and said to Judge Winn, "I will not order the court stenographer to take such statement," or words to that effect, and then, speaking towards the jury Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and, if so, you may write it in your verdict," or words to that effect. Thereupon in the open court I wrote [298] in each verdict a recommendation for clemency of the Court and handed the verdict to the clerk. Afterwards Judge Winn arose and asked to have the jury polled, and again called for a court stenographer and

at that time the court stenographer appeared. After the jury was polled, Judge Jennings, turning to me as foreman of the jury, said, "Now you may make the statement you did on bringing in your verdict," or words to that effect, and I thereupon repeated substantially my original statement to the Court.

A. A. GABBS.

Subscribed and sworn to before me this 31 day of October, A. D. 1914.

NEWARK L. BURTON,

Notary Public for Alaska.

My commission expires November 8, 1917. [299]

*In the District Court for the District of Alaska,
Division No. One.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING CO., a Corporation,

Defendant.

**Proceedings After Polling of Jurors, October 30,
1914, 5 P. M.**

The COURT.—Mr. Gabbs, as Foreman of the Jury, you will make the statement you made to me a while ago.

Mr. GABBS.—We agree that the defendants were found guilty as charged, but thoroughly believe that they have erred in the letter of the law and not in the spirit of the law.

The COURT.—Very well—let the record show that.

Mr. WINN.—Your Honor please, under that statement made (to save the record) by the Foreman of the Jury, we object to the receiving and filing of these verdicts as the verdict of the jury.

The COURT.—Let the record show that.

(Jury excused; whereupon the Court adjourned until 10 A. M. the following day.) [300]

Said motion for New Trial with said affidavits and said portion of the record in support thereof, came on for hearing on the —— day of ——, 1915, and an order was made herein overruling and denying said motion, to which ruling of the Court the defendant excepted and exception was allowed.

That on the 28th day of January, 1915, the defendant, through its attorneys, M. G. Munly and Winn & Burton, filed the following motion: [301]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

Nos. 1034-B, 1035-B, 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
Defendant.

**Motion [of Defendant to Set Aside Verdict of Jury,
etc.].**

Comes now the defendant in the above-entitled cause by its attorneys M. G. Munly and Winn & Burton and moves the Court that the verdict of the

jury to the indictments in the above-entitled cause be set aside or considered and treated as a verdict of acquittal, and that the defendant be discharged upon the following grounds and for the following reasons to wit, *viz*:

I.

Because the true verdict of the jury as expressed by the jurors through their foreman in open court at the close of the trial of the above-entitled cause and after they had retired to the jury-room and deliberated upon their verdict and at the time of bringing in their verdict into Court, was to the effect that defendant had not violated the spirit of the law under which the aforesaid indictments against the above-named defendant.

II.

Because the verdict of the jury to the effect that the defendant had not violated the spirit of the law is the equivalent of a general verdict of "not guilty".

III.

Because such a verdict does not affirmatively find the defendant guilty of all the elements of the crime [302] charged in the indictments.

IV.

Because sentence cannot be passed upon a defendant based upon a verdict other than that of guilty, and the true verdict of the jury in this case was to the effect that the defendant was not guilty of a violation of the spirit of the law.

V.

Because any judgment which might be rendered in the above-entitled cause based upon a verdict of

guilty would be founded upon a verdict which does not specifically find the defendant guilty of all the elements constituting the offense or offenses charged in the indictment and such judgment would be null and void.

VI.

Because said verdict is not responsive to the issues.

M. G. MUNLY and

WINN & BURTON,

Attorneys for Defendant. [303]

**Recital [re Order Overruling Motion to Set Aside
the Verdict, etc.].**

That said motion thereafter duly and regularly came on for hearing and the Court made an order herein overruling and denying said motion, to which ruling the defendant excepted and exception was allowed.

That thereafter judgment was entered upon each of said verdicts, which said judgments will more particularly appear from the records and files of the clerk of this court's office in the respective cases mentioned herein, and an exception was allowed defendant to the entry of said judgments and each of them.
[304]

**Certificate of Official Stenographer to Transcript of
Testimony, etc.**

I hereby certify that I was the Official Court Stenographer for the First Judicial Division, Territory of Alaska, at the time of the trial of the foregoing consolidated cases of the United States of America, Plaintiff vs. Thlinket Packing Company, a cor-

poration, Defendant, Nos. 1034-B, 1035-B & 1036-B, in the District Court for the District of Alaska, Division No. One; that as such official Stenographer I reported the proceedings on the trial of the said consolidated cases, and that the above and foregoing, consisting of pages 1 to 159, inclusive, is a full, true and correct transcript of the testimony and proceedings had and taken by me at the trial of said consolidated cases.

May 26, 1915.

H. F. BENSON,
Court Stenographer. [305]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

1034-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant,

1035-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,

Defendant.

1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion.

Defendant,

**Motion [for Order Settling and Allowing Bill of
Exceptions].**

The filing and presentation of the Bill of Exceptions herein having been by an order of this Court continued until this 14th day of June, A. D. 1915, and now, in furtherance of justice and that right may be done, the defendant presents the foregoing and hereto attached as its Bill of Exceptions in cases numbered 1034-B, 1035-B and 1036-B Consolidated, and prays that the same may be settled and allowed and signed and certified by the judge of this court as provided by law.

JNO. R. WINN and

WINN & BURTON,

Attorneys for Defendant. [306]

Copy of the foregoing Bill of Exceptions received and service admitted this 14th day of June, A. D. 1915.

JNO. J. REAGAN,

Asst. United States District Attorney for the First
Division at Juneau, Alaska, and Attorney for
Plaintiff. [307]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
Defendant.

No. 1035-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
Defendant.

No. 1036-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corporation,
Defendant.

**Order Settling and Allowing Bill of Exceptions and
Making Exhibits Part of Record.**

I, Robert W. Jennings, Judge of the above-entitled court, do hereby certify that the foregoing and above-entitled cases, numbered 1034-B, 1035-B

and 1036-B respectively, were, by an order of this Court, duly and regularly made, according to law, consolidated for the purpose of trial, and that the above and foregoing and hereto attached Bill of Exceptions was presented to me on the 17th day of June, 1915, within the time allowed by the order and rules of this court; and the same having been examined by counsel representing the respective parties, and by the court;

NOW, THEREFORE, I, Robert W. Jennings, Judge *of before* whom said consolidated cases were tried, do hereby settle and allow the same as a full true and correct Bill of Exceptions herein, and do order the same to be filed as and made a part of the [308] record herein; and I do further certify that the said Bill of Exceptions contains a full, true and correct transcript of all the testimony and evidence introduced or offered at or upon the trial of said cases as consolidated, and also the following:

(1) Objections filed herein made by the defendant company by its attorneys, M. G. Munly and Winn & Burton, to the introduction of any testimony or evidence pertaining to any of the charges made in any of the counts in said indictments, which said objections are set forth herein in full, and were made and filed after the selection and swearing in of the jurors to try said cause, and at the time and right after plaintiff had its first witness sworn to testify herein;

(2) The motion made for nonsuit by defendant at the time plaintiff rested its case;

(3) The instructions tendered and offered to the court by the defendant, and requested to be given to

the jury upon the submission of said case to the jury, which said instructions were filed herein on October 29, 1914, and numbered one to five inclusive, being the same instructions that are referred to in the Bill of Exceptions herein, which said defendant excepted to the refusal of the Court to give;

(4) The instructions given by the Court to the jury upon the final submission of said cause;

(5) Motion filed on January 28, 1915, by the defendant, through its attorneys, Winn & Burton, to set aside the verdict of the jury on the several indictments herein, and to treat the verdict as a verdict of acquittal;

(6) The motion for new trial filed herein on October 31, 1914, together with the affidavits in support thereof, [309] signed by J. R. Homer, Wallis George, Z. M. Bradford, D. W. Fales, Charles H. Hall, and A. A. Gabbs;

(7) The verdict of the jury rendered in each case; and

(8) The exhibits "A" & "B" offered upon the trial of said case so consolidated, all of which said last-mentioned proceedings, papers and exhibits are made part of the record herein.

DONE IN OPEN COURT this 23d day of June, A. D. 1915, in the presence of counsel for each party herein, and within the time allowed by the order, rules and practice of this Court.

ROBERT W. JENNINGS,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jun. 17, 1915. J. W. Bell, Clerk. By J. J. Clarke, Deputy.

Signed and ordered to be marked refiled as of this date June 23, 1915.

ROBERT W. JENNINGS,
Judge.

Refiled in the District Court, District of Alaska, First Division. Jun, 23, 1915. J. W. Bell, Clerk. By J. J. Clarke, Deputy. [310]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 1034-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,
Defendant,

No. 1035-B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,
Defendant,

No. 1036-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THLINKET PACKING COMPANY, a Corpora-
tion,

Defendant.

Praeceptum for Transcript on Writ of Error.

To J. W. Bell, Esq., Clerk of the Above-entitled
Court:

Please prepare for the Thlinket Packing Company, the defendant in the above-entitled causes consolidated, for use by the United States Circuit Court of Appeals, Ninth Circuit, on the Writ of Error sued out and allowed herein on the 23d day of June, A. D. 1915, a transcript of the following papers on file in the above-entitled court in the above-entitled causes consolidated, and forward the same, together with the Bill of Exceptions herein, approved by the Judge of the above-entitled court on the 23d day of June, A. D. 1915, to the said Circuit Court of Appeals, Ninth Circuit, San Francisco, California, to wit:

1. The Indictment and Summons in cause No. 1034-B.
2. The Indictment and Summons in cause No. 1035-B. [311]
3. The Indictment and Summons in cause No. 1036-B.

4. Demurrer and Order overruling the same in cause No. 1034-B.
5. Demurrer and Order overruling the same in cause No. 1035-B.
6. Demurrer and Order overruling the same in cause No. 1036-B.
7. The Verdict in cause No. 1034-B.
8. The Verdict in cause No. 1035-B.
9. The Verdict in cause No. 1036-B.
10. The order overruling defendant's Motion filed herein on the 28th day of January, A. D. 1915, which said Motion was to set aside the verdict in each of said cases, or to consider the same in each of said cases as a verdict of acquittal.
11. The Order overruling Motion for New Trial herein in each of said causes No. 1034-B, 1035-B and 1036-B.
12. The Judgment rendered by the Court in 1034-B.
13. The Judgment rendered by the Court in 1035-B.
14. The Judgment rendered by the Court in 1036-B.
15. Motion to make certain exhibits part of the record on Writ of Error.
16. Assignments of error in cause No. 1034-B.
17. Assignments of error in cause No. 1035-B.
18. Assignments of error in cause No. 1036-B.
19. Petitions for Writ of Error in 1034-B, 1035-B and 1036-B.
20. Order allowing Writ of Error and settling amount of supersedeas bond in causes No 1034-B, 1035-B and 1036-B.

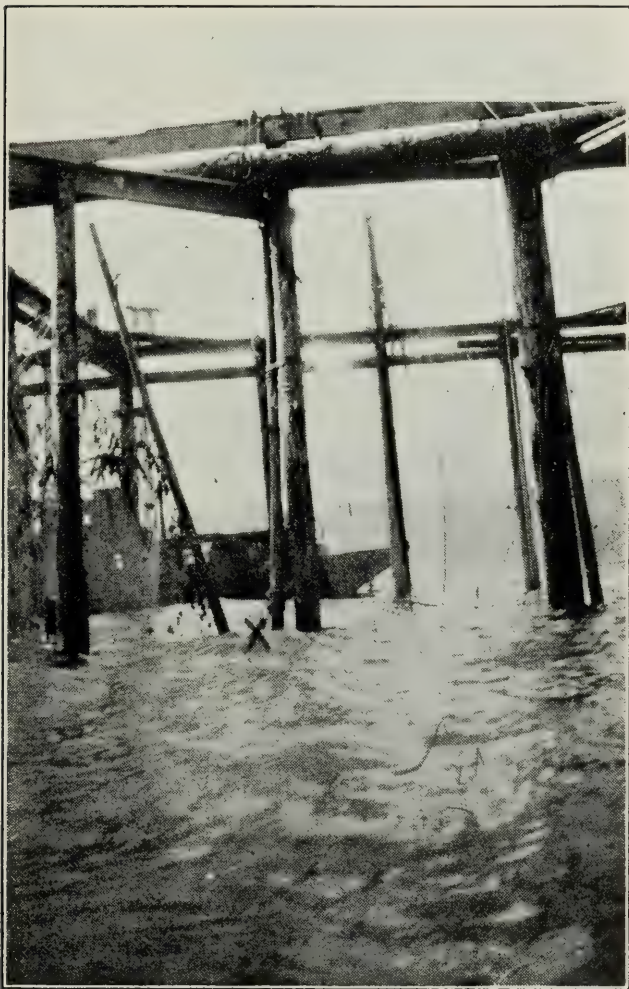
21. Original Writs of Error in causes No. 1034-B, 1035-B and 1036-B.
22. Original Citation in each of said causes No. 1034-B 1035-B and 1036-B.
23. Supersedeas bond in causes No. 1034-B, 1035-B and 1036-B.
24. Bill of Exceptions and Order allowing the same and making it a part of the record herein and this Praeceptum.

WINN & BURTON,

Attorneys for Defendant, Thlinket Packing Company.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jun. 26, 1915. J. W. Bell, Clerk. By J. J. Clarke, Deputy. [312]

[Plaintiff's Exhibit "A"—Photograph.]



[Endorsed]: Plff's Exhibit "A." Received in Evidence Oct. 28, 1914, in Cases No. 1034-5 and Six. J. W. Bell, Clerk. By John Reed, Deputy. [313]

Department of Justice

Exhibit No. B
Received in evidence

1034-10
J. W. Bell Clerk
John. R. S. Deputy



Exhibit No.

Received in evidence

OCT 29 1914

In Case No.

Clerk

Deputy

Washington, D. C.

1912.

JAN. 1875.												JULY.											
K. I. W. S. 1. 5.						N. I. W. T. 1. 5.						K. I. W. S. 1. 5.						N. I. W. T. 1. 5.					
1	2	3	4	5	6	1	2	3	4	5	6	1	2	3	4	5	6	1	2	3	4	5	6
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
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25	26	27	28	29	30	25	26	27	28	29	30	25	26	27	28	29	30	25	26	27	28	29	30
FEBRUARY.												AUGUST.											
1. 2. 3.						1. 2. 3.						1. 2. 3.						1. 2. 3.					
4. 5. 6. 7. 8. 9. 10. 11. 12.						4. 5. 6. 7. 8. 9. 10. 11. 12.						4. 5. 6. 7. 8. 9. 10. 11. 12.						4. 5. 6. 7. 8. 9. 10. 11. 12.					
13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.					
MARCH.												SEPTEMBER.											
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.						1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.						1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.						1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.					
13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.					
APRIL.												OCTOBER.											
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.						1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.						1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.						1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12.					
13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.					
MAY.												NOVEMBER.											
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13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.					
JUNE.												DECEMBER.											
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13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.						13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30.					

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JANUARY.												JULY.											
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FEBRUARY.												AUGUST.											
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MARCH.												SEPTEMBER.											
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30	31						30	31															

APRIL.												OCTOBER.											
S.	S.	T.	W.	T.	F.	S.	S.	T.	W.	T.	F.	S.	S.	T.	W.	T.	F.						
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20	21	22	23	24	25	26	20	21	22	23	24	25	26	27	28	29	30						
27	28	29	30				27	28	29	30	31												

MAY.												NOVEMBER.											
S.	S.	T.	W.	T.	F.	S.	S.	T.	W.	T.	F.	S.	S.	T.	W.	T.	F.						
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24	25	26	27	28	29	30	24	25	26	27	28	29	30										

JUNE.												DECEMBER.											
S.	S.	T.	W.	T.	F.	S.	S.	T.	W.	T.	F.	S.	S.	T.	W.	T.	F.						
8	9	10	11	12	13	8	9	10	11	12	13	15	16	17	18	19	20						
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29	30	31					29	30	31														

1914[illegible]



[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1034-A.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

THLINKET PACKING COMPANY,
Defendant and Plaintiff in Error.

No. 1035-B.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

THLINKET PACKING COMPANY,
Defendant and Plaintiff in Error.

No. 1036-B.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,
vs.

THLINKET PACKING COMPANY,
Defendant and Plaintiff in Error.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the
District of Alaska, Division Number One, do hereby
certify that the above and foregoing and hereto

annexed three hundred and fourteen pages of type-written and written matter numbered from 1 to 314, both inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error; on file in my office and made a part hereof; in Causes Nos. 1034-B, 1035-B and 1036-B, Consolidated, wherein the United States of America is plaintiff and defendant in error, and Thlinket Packing Company, a corporation, is defendant and plaintiff in error.

I further certify that the said Record is by virtue of the Writ of Error and Citation issued in these causes, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to One Hundred forty-two and 40/100 Dollars (\$142.40), has been paid to me by plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled Court this 14th day of July, 1915.

[Seal]

J. W. BELL,

Clerk of the District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: No. 2623. United States Circuit Court of Appeals for the Ninth Circuit. Thlinket Packing Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writs

of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed July 21, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

**[Motion and Stipulation for Order Consolidating
Causes for Hearing in Appellate Court.]**

*In the United States Circuit Court of Appeals,
Ninth Circuit, San Francisco, California.*

No. 2623.

THE THLINKET PACKING COMPANY,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Come now Winn & Burton, attorneys for the Thlinket Packing Company, the above-named plaintiff in error, and move this Honorable Court to consolidate cases Nos. 1034-B 1035-B, and 1036-B of the District Court for the District of Alaska, Division No. 1, for hearing in this Honorable Court, which said cases have been docketed in this court as case No. 2623.

This motion is made and based upon the records and files in said last-numbered case and in this court.

WINN & BURTON,
Attorneys for Plaintiff in Error.

Copy of the above and foregoing received this 31st day of July, 1915, and service admitted.

JAMES A. SMISER,

U. S. Atty.

We also stipulate and agree that the above cases may be consolidated for hearing in the Circuit Court of Appeals for the Ninth Circuit, San Francisco.

JAMES A. SMISER,

U. S. Atty.

[Endorsed]: No. 2623. United States Court of Appeals for the Ninth Circuit. Thlinket Packing Company, a Corporation, vs. United States of America. Motion and Stipulation for Consolidation of Cases for Hearing and Determination. Filed Aug. 7, 1915. F. D. Monckton, Clerk.

**[Order Consolidating Causes for Hearing in
Appellate Court.]**

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of August, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, District Judge; Honorable MAURICE T. DOOLING, District Judge.

No. 2623.

THLINKET PACKING COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

ORDER CONSOLIDATING CAUSES FOR
HEARING AND DETERMINATION.

On consideration of the Motion of Messrs. Winn & Burton, counsel for the planitiff in error, filed August 7, 1915, to consolidate the three causes of the above title,—which said three causes were docketed in this court on July 21, 1915, as one cause, there being but one certified Transcript of the Record filed therein,—and pursuant to the stipulation of Mr. United States Attorney James A. Smizer, agreeing thereto, it is ORDERED that the said motion be, and hereby is, granted, and that the said three causes be and hereby are consolidated for hearing and determination on the said certified Transcript of the Record.

2
No. 2623

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,
Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error from the United States
District Court for the District of
Alaska, Division No. 1

M. G. MUNLY,
ROBERT N. MUNLY, and
WINN & BURTON,

Attorneys for Plaintiff in Error.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error from the United States
District Court for the District of
Alaska, Division No. 1

M. G. MUNLY,
ROBERT N. MUNLY, and
WINN & BURTON,

Attorneys for Plaintiff in Error.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This cause is in the Appellate Court on a Writ of Error from the District Court for the District of Alaska, Division Number One, to review three judgments of conviction rendered by the last mentioned court, and fines imposed thereunder, upon defendant (plaintiff in error) by said last above mentioned court. Throughout this brief we will refer to the Thlinket Packing Company as Defendant and the United States of America as Plaintiff.

The indictments were found under a section of

“An Act of June 26, 1906, Entitled, ‘An Act for the Protection and Regulation of the Fisheries of Alaska.’” This Act of Congress is embodied in the Compiled Laws of the Territory of Alaska commencing at Section 259, page 197, the Indictments being under Section 5 of the Act as originally numbered but under Section 263 of the Compiled Laws of Alaska. In referring to the different sections of the Act in question we shall refer to them under the numbers as they appear in the Compiled Laws in-

stead of the numbers in the original Act. The said Section 263 reads as follows:

“That it shall be unlawful to fish for, take or kill, any salmon of any species in any manner or by any means, except by rod, spear or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock Post Meridian of Saturday of each week until six o'clock Ante Meridian of the Monday following, or to fish for, or catch, or kill in any manner, or by any appliances except by rod, spear or gaff, any salmon in any stream of less than 100 yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. *Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of webbing or net of the 'Heart' of such traps on each side of the 'Pot' shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes.*”

There were three indictments found against the defendant, numbered in the trial court, 1034-B, 1035-B, and 1036-B. These three indictments con-

tained fifteen counts altogether. *The defendant is charged in counts 1, 2 and 3 in indictment No. 1034-B, and counts 1 and 2 in indictment 1035-B with having violated said Section 263 in that, between the hours of 6 o'clock Post Meridian on certain Saturdays and 6 o'clock Ante Meridian on certain Mondays during the months of July and August, 1914, in certain waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska, and within the jurisdiction of this court, it did unlawfully and wrongfully maintain and operate for fishing certain fish traps therein designated without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof, lifted or lowered in such a manner as to permit the free passage of salmon and other fishes. (P. R. 2-12 incl.)*

Counts 4, 5 and 6 of indictment 1034-B, and all of the counts numbered from 1 to 7, inclusive, of indictment No. 1036-B attempt to charge the defendant with having violated said Section 263 by, between the hour of 6 o'clock Post Meridian on certain Saturdays and 6 o'clock Ante Meridian on certain Mondays in the year of 1914 in certain waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of the trial court, *unlawfully and wrongfully maintaining and operating for fishing certain traps therein designated without having the tunnel of said trap closed and without*

having twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes. (P. R. 2-10 incl. 15-22 incl.)

It will be observed the only difference in the counts or charges contained in the indictments is that in the first class of charges or counts the defendant is accused of violating the section of the statute in question in ONE respect only, viz:

By its failure, during the weekly close season, "To have twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes";

while in the other class of counts or charges the defendant is accused of violating said section of the statute in TWO respects, viz:

FIRST, by its failure, during the weekly close season, "To have the tunnel of said trap closed"

SECOND, By its failure during the weekly close season "To have twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof, lifted or lowered in such a manner as to permit the free passage of salmon and other fishes."

A demurrer was interposed to the indictment in cause No. 1034-B as a whole and to each count therein contained separately. (P. R. 24-30).

A like general, special and separate demurrer was interposed to the indictments in cases Nos. 1035-B and 1036-B (P. R. 32-34 and 36-43.)

All of the said demurrers came on for hearing before the court and each and all of them were overruled and denied and the defendant excepted to the ruling of the court and exception was allowed. Whereupon the defendant corporation, through its counsel entered a plea of "not guilty" to the several indictments and the several charges and counts therein contained and the cause was set down for hearing on October 15, 1914.

By agreement of counsel the cases were consolidated for trial.

After the jury was duly qualified, selected, empaneled and sworn to try the consolidated case, and Ernest P. Walker, a witness on behalf of the United States called and sworn to testify, the defendant made certain objections to the introduction of any testimony or evidence in said cause on the grounds set forth in said objections found in the record on pages 152-153 and 154, which said objections and each and all of them were by the court overruled and denied and an exception allowed the defendant. Said objections are set out in full in this Brief under the head "Specification of Errors Relied Upon."

After plaintiff closed its case and had introduced

all of its testimony and evidence, the defendant, through its attorneys, made and filed a motion for a non-suit or a directed verdict in favor of the defendant, which said motion in all respects was overruled and denied and an exception allowed defendant. (P. R. 269-271.) A full copy of the said motion is also set out therein under "Specification of Error Relied Upon."

The defendant then proceeded to introduce its testimony and evidence, and after all the testimony and evidence was in, the defendant in this case offered a set of instructions which are numbered one to five, inclusive, and found in the record on pages 315-318. A full copy of said instructions are set out further on in this Brief.

The court refused to give the said instructions, or any of them, to which refusal and ruling of the court defendant excepted and exception was allowed. At the close of the argument of counsel the court instructed the jury in the manner and form set out in the record pages 319-325 inclusive.

The instructions given the jury by the court were not numbered and were set out somewhat together in the record and the instructions excepted to by the defendant are set out in the Assignment of Errors in this Brief. All of the instructions given by the court were not excepted to. (P. R. 319-326 incl.)

The court instructed the jury that although the cases were consolidated and tried as one it would be their duty to deliberate on each of the three indict-

ments separately and render a verdict in each case of guilty or not guilty, and on the retiring of the jury to deliberate on their verdicts the jury was presented with forms of verdict accordingly. There was no exception taken to these proceedings. After the jury had retired for consideration of their verdicts and had deliberated thereon they came into court with what the foreman stated was three verdicts and the record of what transpired in court at that time will appear from the affidavit of the foreman on file herein, and the affidavit of several other jurors and a partial report of the court stenographer. (Record pages 331 to 337 inclusive.) On account of what occurred at said last mentioned time the defendant's counsel *objected to the court filing or receiving each and all of said verdicts. The objection was overruled by the court and an exception allowed the defendant. This error will be enlarged on further on in this Brief.*

Motion for new trial was made on the ordinary statutory grounds and on the further ground, "irregularity in the proceedings of the court and jury and orders of the court made at the time and upon the reception of the verdicts herein, and abuse of discretion of the court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the court and jury, and rulings and orders of the Court so made, showing such abuse of discretion will more particularly appear by the affidavits of A. A. Gabbs, Z. M.

Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached, and the stenographic report of the rulings, orders and actions of the court at the time and upon receiving and filing the verdicts herein. (P. R. 331-339.)

As the court stenographer was not present at the time of receiving of the verdicts as above stated, it became necessary upon a motion for new trial to prove by the above mentioned affidavits just what took place at that time. *The facts set up in these affidavits are in no wise contradicted.* The court overruled the several motions for new trial, to which said ruling of the court an exception was asked by the defendant and allowed. In addition to the motion for new trial *a motion of defendant to set aside the verdict and to declare the defendant not guilty was made* and argued at the same time that the motion for a new trial was argued with the understanding that one of the motions would not be considered as a waiver of the other. (P. R. 337-339.) This motion was also overruled and defendant allowed an exception to such ruling of the court. Thereafter separate judgments and sentences upon each verdict in causes Nos. 1034-B, 1035-B and 1036-B were entered by the court against defendant and it was the sentence and judgment of the court that defendant, The Thlinket Packing Company, a corporation, pay a fine of One Hundred Dollars in each of said cases, making a total fine of Three Hundred Dollars. (P. R. 550-554.) The defendant excepted to the entering of said judgments and the imposing of said fines.

SPECIFICATION OF ERRORS RELIED UPON

The trial court erred:

(1) In overruling defendant's general demurrer to each indictment and the special demurrer to each and every count in each and every indictment, which general demurrer to each indictment is as follows:

"That said indictment does not state facts sufficient to constitute any crime against said defendant corporation."

The special and separate demurrer to each count in each and every indictment is as follows:

(a) "That the facts stated in said count do not constitute a crime against said defendant company. The mere statement in said count that the said defendant company did unlawfully and wrongfully maintain and operate for fishing a certain trap* * * without having twenty-five feet of the webbing or net of the heart of said trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes, does not state or charge any offense or crime against the said defendant."

(b) "That said charge in said count is duplicitous and ambiguous and attempts to charge two crimes, and does not substantially conform with the requirements of Chapter 7 of the Compiled Laws of the Territory of Alaska, being subdivision two of

section 2147 of the said Compiled Laws of the Territory of Alaska in that the statement of facts in said count and the other part of the indictment referring to said count, are not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged."

(2) In overruling and denying defendant's objections made and filed after the empaneling of the jury and when the first witness for the plaintiff, was placed upon the witness stand and sworn to testify, which said objections are as follows:

OBJECTIONS

"Come now M. G. Munley and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to-wit: Indictments Nos. 1034-B, 1035-B and 1036-B, and after the empaneling of the jury and the first witness on the part of the plaintiff, the United States, being sworn to testify concerning the alleged crime set forth in each and all of the counts set out in the foregoing indictments, and object to any testimony or evidence being introduced, offered or received by this court pertaining

to any of the alleged charges in each and every indictment, and in each and every count set forth in the same upon the following grounds and for the following reasons, to-wit:

“I. That each several indictment and every count thereof does not charge the offense defined and set out in the statute. That each several indictment, and every count thereof fails to charge that defendant did unlawfully fish for, take or kill salmon of any species.

“II. That each several indictment and every count thereof does not allege that defendant failed to close the gate, mouth or tunnel, or raise or lower web of the heart next to the pot in a trap designed and used by defendant to fish for, take or kill salmon of any species.

“III. That each several indictment and every count thereof does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge which he is called upon to defend.

“IV That each several indictment and every count thereof fails to allege that said alleged fishing was done during the weekly close season.

“V. That each several indictment, and ev-

ery count thereof does not allege or set out any particulars or facts as to the closing, raising or lowering the webbing of the heart next to the pot in such manner as to permit the free passage of salmon and other fishes in such a way as to embrace every element of the offense defined by the statute.

“VI. That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the districts or places excepted from the statute, viz: that it was not in Cook’s Inlet, the Delta of the Copper River, Bering Sea, or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz: rod, spear or gaff.

“VII. That each several indictment and every count thereof fails to charge the offense denounced by the statute in such manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the court to pronounce judgment in case of conviction according to the right of the case.”

(3) The court erred in permitting the witness Walker to testify on behalf of the plaintiff over defendant’s objections as to where the fish traps mentioned in the indictments were located. (P. R. 195.)

(4) The court erred in overruling and denying defendant's motion for non-suit or a directed verdict which was made and filed in court at the close of the evidence and testimony of plaintiff, which said motion is as follows:

"Come now M. G. Munley and Winn & Burton, attorneys for the Thlinket Packing Company, a corporation, in the three indictments in this court against the said Thlinket Packing Company, to-wit: Indictments Nos. 1034-B, 1035-B and 1036-B, and attorneys for said company in all the counts in each and all of those indictments and move the court to direct the jury to bring in a verdict in favor of the Thlinket Packing Company, or to dismiss the proceedings for want of evidence to establish each and all of the counts, or any of the counts, set out in the three indictments above mentioned, upon the following grounds and for the following reasons:

"First, That each several indictment and every count thereof fails to charge that the defendant did unlawfully fish for, take, or kill salmon of any species.

"Second, That there is no evidence to establish such fact in the case; that each and all of the several indictments, and each count thereof, do not allege that the defendant failed to close the gate, mouth, or

tunnel, or raise or lower the heart next to the pot in a trap that is designed and used by the defendant to fish for, take, or kill salmon of any species, and that there is no evidence in the case to establish such fact.

“Third, That each of the several indictments and every count therein does not set forth the facts constituting the alleged offense in such manner as to apprise the defendant of the nature of the charge of which he is called upon to defend.

“Fourth, That each several indictment, and every count thereof, fails to allege that the said alleged fishing was done during the closed season.

“Fifth, That each several indictment and every count thereof does not allege or set out any particulars or facts as to the closing of the tunnels or facts with regard to the raising or lowering of the webbing of the heart next to the pot in such manner as to prevent the free passage of salmon in such a way as to embrace every element of the offense defined by the statute.

“Sixth, That each several indictment and every count thereof fails to allege that the locality where such fishing was done was not in the district or place excepted from the statute; that is, it was not in Cook’s Inlet, the Delta of the Copper River, Bering Sea,

or waters tributary thereto, or that it was not with one of the excepted forms of gear, viz: rod, spear or gaff, and that there is no evidence now before the jury to show as to whether or not, if any crime was committed, that it was committed within the prohibited districts of the waters of Alaska as defined by the section under which the indictments are made.

“Seventh, That each several indictment and every count thereof fails to charge the offense denounced by the statute in such a manner as to enable a person of common understanding to know what is intended, and the offense is not alleged with such a degree of certainty as to enable the court to pronounce judgment in case of conviction according to the right of the case.

“Eighth, That there is no evidence in the case on the part of the Government to disprove the fact or to show as to whether or not the way the respective traps were opened that there could or could not be a free passage of salmon and other fishes, counsel for the defendant company claiming that the reasonable construction of the statute is that if the trap was open in such a way so that it did not prevent the free passage of salmon and other fishes, then the spirit of the statute is complied with;

that the only thing the statute is intended to prohibit [permit] is the free running of salmon and other fishes, and that is an element which it is incumbent upon the Government to establish before it can establish any charge against the defendant company."

(P. R. 269-271.)

(5). In refusing to instruct the jury as requested by defendant in its request No. 1, which request was as follows:

"Gentlemen of the Jury, this is a criminal case consisting of three indictments against the defendant, and each indictment containing two or more counts or charges, each count or charge claiming on the specific date mentioned therein that the defendant violated the fishing laws of Alaska by reason of maintaining and operating certain fish traps and failing to, in some instances or some of the counts, to raise or lower the web of that part of the trap known as the heart, as required by law, and in other counts charging this last matter and also the failure to close what is known as the tunnel leading from the heart of the trap to the pot, as required by law. It is necessary for the Government to prove these facts last mentioned beyond a reasonable doubt before you would be justified in finding the defendant guilty of any one

or more of the counts contained in the three indictments referred to herein. And should the Government fail to prove to your mind beyond a reasonable doubt that the facts mentioned herein are true, then, it is your duty to acquit the defendant."

(6) In refusing to instruct the jury as requested by defendant in its request No. 2, which request was as follows:

"I also instruct you, Gentlemen of the Jury, that the purpose and spirit of the law is to protect salmon so that they may not be obstructed in their passage to their spawning ground during the weekly close season. Unless the Government in this case prove to your mind beyond a reasonable doubt that the web (279) of the heart of any trap described in any of these various indictments or various counts was not raised, opened or lowered in such a manner as to permit the free passage of salmon or other fishes to escape and go to their spawning ground, then, it is your duty to return a verdict of 'Not Guilty' herein."

(7). In refusing to instruct the jury as requested by defendant in its request No. 3, which request was as follows:

"The statute provides that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such a

manner as to permit the free passage of salmon or other fishes during the weekly close season. As a matter of fact if you find in any of the cases or charges against the defendant, that 25 feet of the webbing of the heart was so lifted or lowered to permit the free passage of salmon or other fishes, your verdict must be for the defendant, and, in this connection the statute does not mean that 25 feet of the heart of the trap must be raised or lowered vertically; if 25 feet of the webbing is lifted or lowered in a "V" shape but yet in such manner as to permit the free passage of salmon and other fishes such opening is a sufficient compliance with the statute and your verdict must be for the defendant."

(8). In refusing to instruct the jury as requested by defendant in its request No. 4, which request was as follows:

"The language of the statute is, that 25 feet of the webbing on each side of the heart next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes. That does not mean 25 feet square or that 25 feet must be torn out of the sides of the heart every weekly close season. Any manner of lowering or lifting 25 feet of the heart so as to permit the free passage of sal-

mon and other fishes so that they may go on through the trap to their spawning grounds is sufficient. And if you find as to any of the charges in these indictments that the heart of any (280) trap was so lifted or lowered or opened, your verdict must be for the defendant."

(9). In refusing to instruct the jury as requested by defendant in its request No. 5, which request was as follows:

"I instruct you that the right of fishing, or of fishery, as it is called, is common and free to every citizen. The Government has, however, the power to regulate and restrict it. This right to free fishing can only be limited or taken away just as far as any such regulations go; and, therefore, the regulations regarding salmon traps during the weekly close season, established by the Government, cannot be extended or expanded beyond their strict meaning. The statute says that:

'Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side of the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.'

“Unless the language of the statute itself provided that twenty-five feet of the heart on each side next to the pot should be lifted or lowered from the top to the bottom of the heart, it would be adding to the statute to say so.

“You must consider the law as it is. You must determine from the evidence whether 25 feet of the web of the heart on each side of the pot was lifted or lowered in such manner as to permit the free passage of salmon and other fishes. If you find that it was so lowered or lifted in any of the charges against this defendant alleged in the various indictments you must acquit the defendant as to such count.”

(10). The court erred in instructing the jury as follows:

“It is not a matter of any importance in this case what a man by the name of Bower may have interpreted this law to be. It is not a matter of importance in this case, so far as my functions are concerned, how a man named Cobb may have interpreted this law. It is not a matter of importance how the Department itself may have interpreted this law. It is a question of what I think the language—what I think this law means, and whatever I think it means and what I tell you it means, you must accept as the law of the case.

“Now the indictment in this case is drawn under a certain section of the statute—I will read you that section:

“ ‘Throughout the weekly closed season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.’

“Now, I will tell you, gentlemen, what I think that section means, and first, I will say that I think it means just exactly what it says. I don’t think there is a superfluous word in that section, nor a word that doesn’t express its meaning. Now, let us see: ‘Throughout the weekly closed season herein prescribed’ —The statute has just prescribed that from six o’clock Saturday afternoon to six o’clock Monday morning is the weekly closed season. Now, it says: ‘Throughout the weekly closed season herein prescribed — (that is the time now)—the gate, mouth or tunnel’ — some people call it a gate, some call it a mouth, some call it a tunnel, so it says: ‘The gate, mouth or tunnel of all stationary and floating traps’ —some traps are stationary and some floating, evidently,

but the section takes them both in—‘of all stationary and floating traps shall be closed and—(it doesn’t say or)—twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes.’ Now, let us see—it wouldn’t do to say that some of the net or webbing shall be lowered, unless the statute says how much shall be lowered, so the statute says twenty-five feet of the webbing or net shall be lowered or raised. If the statute stopped there, it would not be definite, because it wouldn’t say what part of the webbing of the heart of the fish trap, so it is going to be definite about that, so it says: ‘twenty-five feet of the webbing or net of the heart of such trap.’ That wouldn’t be definite if it stopped there, because the heart of a trap has two sides, so it says, in order to make that definite: ‘Twenty-five feet of the webbing or net of the heart of the trap on each side’—each side means both sides, consequently—‘Twenty-five feet of the webbing or net of the heart on both sides’—that wouldn’t be definite if it stopped there, because the heart extends over some little distance—what part of the heart?—Then it says: ‘The heart next to the

pot.' What is to be done with it, this twenty-five feet of the webbing of the heart next to the pot on both sides of the heart—what is to be done with it? It shall be lifted or lowered. Now, there is the conjunction 'or'—either one, either lifted or lowered. Is that the end of the section? No. It not only says twenty-five feet of the webbing of the heart next to the pot on each side be lifted or lowered, but that twenty-five feet must be lifted or lowered in a certain way or to accomplish a certain end and so it says that it must be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

“Now, that is a positive command, gentlemen, that twenty-five feet of the net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that that twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide that window-pane in two parts. Suppose that window-pane were actually

in two separate parts, so that each part could be lowered or raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way—I am asking you to raise or lower it. Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of twenty-five feet.” (P. R. 319-325).

(11). The court erred in receiving and filing over the objections of defendant the three verdicts of guilty rendered in causes Nos. 1034-B, 1035-B, and 1036-B, respectively, and erred in receiving and filing each and all of said verdicts.

(12). The court erred in overruling the following motion made by defendant:

MOTION

“Comes now the defendant in the above-entitled cause by its attorneys, M. G. Mully and Winn & Burton, and moves the court (58) that the verdict of the jury to the indictments in the above-entitled cause be set aside or considered and treated as a verdict of acquittal, and that the defendant be discharged upon the following grounds and for the following reasons, to-wit, viz.:

I.

“Because the true verdict of the jury, as expressed by the jurors through their foreman in open court at the close of the trial of the above-entitled cause and after they had retired to the jury-room and deliberated upon their verdict and at the time of bringing in their verdict into court, was to the effect that defendant had not violated the spirit of the law under which the aforesaid indictments were returned against the above-named defendant.

II.

“Because the verdict of the jury to the effect that the defendant had not violated the spirit of the law is the equivalent of a general verdict of ‘not guilty.’

III.

“Because such a verdict does not affirmatively find the defendant guilty of all the elements of the crime charged in the indictments.

IV.

“Because sentence cannot be passed upon a defendant based upon a verdict other than that of guilty, and the true verdict of the jury in this case was to the effect that the defendant was not guilty of a violation of the spirit of the law.

V.

“Because any judgment which might be rendered in the above-entitled cause based upon a verdict of guilty would be founded upon a verdict which does not specifically find the defendant guilty of all the elements constituting the offense or offenses charged in the indictment and such judgment would be null and void.

VI.

“Because said verdict is not responsive to the issues.”

“M. G. MUNLY,
WINN & BURTON,
Attorneys for Defendant.”

(13). The court erred in overruling the motion for new trial herein, which is as follows:

MOTION FOR NEW TRIAL

“Comes now the above-named defendant, by its attorneys, M. G. Munly and Winn & Burton, in each of the above-entitled, numbered, causes consolidated, and feeling itself aggrieved herein, moves the court to set aside each and all of the verdicts rendered in said causes Nos. 1034-B, 1035-B, 1036-B, against the said defendant in each of said causes and filed in this court on the 30th day of October, A. D., 1914, for the following reasons and following causes materially affecting the substantial rights of said defendant.

“First. Irregularity in the proceedings of the court and jury and order and orders of the court made at the time and upon the reception of the verdict herein, and abuse of discretion of the court by said actions, rulings and orders of said Court by which the said defendant was prevented from having a fair trial herein; which said irregularities in the proceedings of the court and jury, and rulings and orders of the court so made, showing such abuse of discretion will more particularly appear by the affidavits of A. A. Gabbs, Z. M. Bradford, Joe Pippin, J. L. Gage, Charles H. Hall and Wallis George, jurors, hereto attached,

and the stenographic report of the rulings, orders and actions of the court at the time and upon receiving and filing the verdicts herein.

“Second. Insufficiency of the evidence to justify the aforesaid verdicts and each and all of them rendered in the above-entitled causes consolidated, and said verdicts and each and all of them are against law.

“Third. Error in law occurring at the trial and excepted to by the defendants.

“M. G. MUNLY,
WINN & BURTON,
Attorneys for Defendant.”

(14). The court erred in signing and entering each and all of the judgments herein in cases Nos. 1034-B, 1035-B, and 1036-B respectively, and imposing a fine of One Hundred Dollars in each case upon the defendant.

ARGUMENT

In the consideration of the foregoing Specifications of Error and the presentation of this case to this Honorable Court, we may combine for argument the following, to-wit:

I.

(a). Specification of Error No. 1 claiming that the trial court erred in overruling both the general and special demurrers to the different indictments and each count contained therein.

(b). Specification of Error No. 2 being the objections made and filed, after the jury was empaneled and the first witness sworn, to the introduction of any testimony or evidence in the case.

(c). Specification of Error No. 4 being the error complained of in the trial court overruling and denying defendant's motion for a non-suit, or instructed verdict in the case.

Specifications Nos. 1 and 2 raise the question as to the sufficiency of the several indictments and each and every count therein contained. Specification No. 4 raises the same question and in addition thereto the question of the insufficiency of the evidence of plaintiff to support a verdict of guilty.

In order to understand and properly construe the

entire statute under which these several indictments were found, it is necessary to analyze its purpose as a whole. This statute was passed to Regulate Fishing in Alaska.

Referring to the Compiled Laws of the Territory of Alaska, the statute is at page 197.

Section 259, being the first section, provides for license tax upon canned and salt salmon;

Section 260 provides a system of rebates upon such taxes for maintenance of private hatcheries;

Section 261 declares dams, fish wheels and all kinds of obstructions to salmon in the streams to be unlawful;

Section 262 places restrictions on the operation of seines, traps, etc., as to distance, and other matters;

Section 263, under which these indictments were found, makes it unlawful to fish for, take or kill any salmon, of any species, at certain times in certain places and by certain gear;

Section 264 delegates power to the Secretary of Commerce and Labor to set aside streams for spawning grounds, and other powers;

Section 265 prohibits canning salmon forty-eight hours after catching and killing the same;

Section 266 prevents waste of fish;

Section 267 prevents false branding;

Section 268 provides for annual reports to be made by packers of salmon;

Section 269 places all kind of fishing under the control of the Secretary of Commerce and Labor;

Section 270 places the enforcement of the law in the hands of the Secretary of Commerce and Labor;

Section 271 provides punishment for its violation;

Section 272 authorizes prosecution in the coast states as well as in Alaska for violation of this act;

Section 273 repeals former acts in conflict;

Section 274 provides when the act shall become effective;

Section 263, under which the indictments were found, makes it *unlawful to fish for, take or kill any salmon of any species at certain times in certain places and by certain gear*. The evident purpose of this section is to denounce and *prohibit fishing for, taking or killing of salmon of any species, (1) during the weekly close season in all the waters of Alaska, except Cook's Inlet, the delta of Copper River, Bering Sea and the waters tributary thereto; and (2) prohibits such fishing during the daily close season prescribed for streams of less than 100 yards width.*

In this case we are concerned with the weekly close season only. The fishing for, taking or killing by rod, spear or gaff, of any salmon, is permissible. Fishing for, taking or killing salmon done by any other means during the weekly close season, is unlawful. The prohibition is not limited to traps alone. Fishing by gill net, or by any kind of seine, as well as by traps, is within the prohibition. In the case of traps, the law, as a matter of precaution, requires that traps shall be regulated in a certain manner,

that certain parts of the trap shall be open and certain parts of the trap shall be closed so as to more effectively prevent that kind of gear from *fishing for, taking or killing salmon*. In other words, *it requires that twenty-five feet of the webbing on each side of the heart, next to the pot, shall be lifted or lowered, so as to permit the free passage of salmon and other fishes, and it also requires that the gate, mouth or tunnel of all stationary or floating traps shall be closed during such close season.*

The section of the statute in question does not attempt to enlarge the offense defined in the first sentence of the section, that is,—“*It shall be unlawful to fish for, take or kill any salmon of any species * * * **”. Nor does it create another offense where there is a failure to lift or lower the webbing as required, or still another offense where the tunnel is not closed. If that were so there would be two different crimes created by the statute, for traps alone, *Viz.: fishing for, taking or killing salmon; and, the obstruction of salmon during the close season in question.*

Should the court hold *that a failure to have twenty-five feet of the webbing or net of the heart lifted or lowered in the manner prescribed by the statute, constitutes a crime, and also, a failure to have the tunnel of the trap closed constitutes a crime, then* the demurrer should have been sustained to counts 4, 5, and 6 of Indictment 1034-B, and all the counts from 1 to 7 in Indictment No. 1036-B, on the ground

and for the reason that each of said counts would charge two crimes, *that is, a failure to have the webbing or net lifted or lowered in the manner prescribed by the statute; and also a failure to have the tunnel closed.*

We contend that these additional clauses of the statute, and apparently upon which the indictments of this case are based, concern the regulation of traps during the close season and are merely directory and do not denounce as unlawful the failure to follow such terms. In other words, the crime consists of *the unlawful fishing for, taking or killing of any salmon by gill net, seine, or trap.* It was never intended that another and additional offense was created in the case of traps alone. The obstruction of salmon is denounced in Section 261 and 262.

The code of Alaska (Sec. 2158, Compiled Laws of Alaska 1913, page 51; 1 Fed. Statutes Ann., 341-348, Sect. 48) provides, among other things, that the indictment "*must be direct and certain* as regards (1) the party charged, (2) crime charged, and (3) the principal circumstances of the crime charged that are necessary to constitute a complete crime."

The indictments charge the defendant with "*maintaining and operating traps for fishing during the close season at certain points without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered, in such a manner as to permit the free passage of*

salmon and other fishes." The defendant in the caption of the several indictments is charged with "*unlawful fishing.*" Hence, the indictments are ambiguous and *not direct and certain* as required by the above statute.

Section 49 of the "Alaska Criminal Code (page 348, Fed. Stat. Ann., Subd. 4) prescribes "that the indictment is sufficient if it can be understood therefrom * * * (Subd. 6) that the act or omission charged as a crime is clearly and distinctly set forth in ordinary concise language, and without repetition, and in such manner as to enable a person of common understanding to know what is intended, and (subd. 7) that the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon conviction, according to the right of the case."

Notwithstanding the foregoing statute the right of fishing, or fisheries, as it is called, under the common law was free to every citizen. However, the Government has the power to regulate and restrict it but statutes restricting such rights are in derogation of the common law and should be strictly construed.

"In construing statutes in derogation of common right, the common law is presumed to be in force until it appears that it has been abrogated or modified by statute; therefore, except in jurisdictions where the rule has been abrogated by express amend-

ment, all statutes in derogation of the common law are to be strictly construed."

36 CYC 1179.

In order to enforce a penalty against a person it must be brought clearly within both the spirit and the letter of the statute.

Where the language of the Legislature is fairly susceptible of two different meanings, that one should be preferred which excludes and prevents conclusions that are mischievous and unjust.

State v. McGuire, 33 Pac. 666

State v. Fisher, 98 Pac. 713-4

Commonwealth v. Hall, 128 Mass. 410-

35 Am. Rep. 387.

It was doubtless the intention of Congress in the passage of the Act in question to provide a method of closing the traps and of adjusting the same so as to prevent illegal fishing. The failure to comply with this regulation alone does not constitute the crime denounced by the statute. The crime named *is the actual fishing for or catching of fish*, during the close season, and unless this is set out in the indictments by suitable averment, there is no proper allegation of the crime defined and denounced by the statute. Applying the above test, all of the indictments in the case at bar are fatally defective.

An indictment is fatally defective if an essential element of the crime intended to be charged is omitted and the sufficiency of the indictment is to be tested by ascertaining whether it contains every element

of such offense. All matters required by the act as pre-requisite to a criminal conviction must be set out in the indictment in order to make it sufficient, and as nothing in a criminal case can be charged by implication, intendment or recital, every fact necessary to be proven to constitute the crime must be directly and affirmatively alleged.

U. S. v. Hess, 124 U. S. 483.

U. S. v. El Paso N. E. R. Co. 178 Fed.
845

U. S. v. Carll, 105 U. S. 612.

U. S. v. Simmons, 96 U. S. 360.

Commonwealth v. Clifford, 8 Cush.
(Mass.) 215;

Commonwealth v. Bean, 11 Cush.
(Mass.) 414;

Commonwealth v. Bean, 14 Gray
(Mass.) 52

Commonwealth v. Filburn, 119 Mass.
297.

U. S. v. Louisville & N. R. R. Co. 165
Fed. 936

U. S. v. Post, 113 Fed. 852.

U. S. v. Marx, 122 Fed. 964

. . In the above case of the United States vs. Simmons, the indictment charged that the defendant did knowingly and unlawfully cause and procure to be used as a still, boiler and other vessels for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, in a certain

building and on certain premises where vinegar was manufactured and produced against the peace and dignity of the United States, etc.

In order to constitute the offense under the statute, it was necessary that *vinegar was being manufactured on the premises at the time the still was used for distilling*. The matter came before the court and Mr. Justice Harlan held the indictment to be insufficient and said: "Nor does it sufficiently appear that vinegar was manufactured or produced *in the building and on the premises referred to at the time the still and other vessels were used for the purpose of distilling*. It is consistent with the averments that the vinegar had been manufactured or produced long prior to the date when the alleged distilling occurred. The two facts must co-exist, in order to constitute the offense described in the statute."

All of the above and foregoing citations are along the same line and uphold the same doctrine laid down in the Simmons case.

U. S. v. Marx, 122 Fed. 964. Indictment for conspiracy. The indictment alleged that defendants, residents of Eastern District of Virginia, did, at Washington in the District of Columbia, and at Norfolk, in the Eastern District of Virginia, within the jurisdiction of the court (Dist. Ct. E. Dist. of Va.), conspire etc. to defraud the United States. The court in sustaining the demurrer, said: "The case is now before the court on a demurrer to the in-

dictment, and without meaning to express any opinion as to the merits of the case, or whether the offense charged is itself an indictable one or not, the court is clearly of the opinion that the demurrer should clearly be sustained, as the indictment does not set forth the crime sought to be covered by it with that degree of particularity and accuracy required in the prosecution for conspiracy," Citing *U. S. v. Hess*, 124 U. S. 483.

Other strong cases on this point are:

Miller v. U. S. 133 Fed. 337.

Harper v. U. S. 170 Fed. 385.

Batchelor v. U. S. 150 U. S. 426

Ball v. U. S. 140 U. S. 135

U. S. v. Britton, 107 U. S. 655.

Morris v. U. S. 161 Fed 672.

In the case at bar the indictment does not directly charge that the Thlinket Company did *fish for, take or kill any salmon*, which is the gist of the offense denounced by the statute. Any averment to that effect in these indictments, is made purely by inference or implication, as it only charges that the traps were not regulated in such manner as to permit of the free passage of salmon and other fishes.

The implication of illegal fishing in this averment is so remote that it can hardly be considered that the government intended to charge that crime as defined by the statute. The only conclusion that can be drawn from the charge is that the Government relied upon the last paragraph of the statute, which

is only directory, as to the method of regulating traps during the close season, and does not define any crime or offense, or provide in any way that the failure to comply with its terms shall constitute the offense intended by the statute. "Obstructing the free passage of salmon" could not by any reasonable implication be construed as clearly charging the "*fishing for, taking or killing of any salmon.*"

No statute denounces the failure "*to permit of the free passage of salmon*" as a crime or states that it will be regarded as equivalent to the fishing for, taking or killing of salmon, and as the indictments merely charge failure to permit free passage of salmon, and do not charge the defendant with fishing for taking or killing salmon, it fails utterly to charge any crime, and therefore the demurrers to each and all of the indictments and each and every count therein contained should have been sustained.

The indictment must charge all the elements which constitute the crime so particularly as to enable the defendant to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense.

U. S. v. Hess, 124 U. S. 483.

U. S. v. Cruikshank, 92 U. S. 542.

U. S. v. Simmons, 96, U. S. 360.

In our judgment a conviction under this indictment would be no bar to another prosecution for the crime denounced by the section of the statute under consideration as the indictment charges only the

failure "to permit the free passage of salmon and other fishes, and this would certainly be no bar to a conviction for the "fishing for, taking or killing of any salmon," etc. This is plainly contrary to the spirit of the criminal jurisprudence of the United States courts and in light of the decisions just cited is enough to render the indictments fatally insufficient on demurrer.

Section 263 being the section under which the indictments were found excepts certain waters from the force and effect of the statute, being the waters of Cook's Inlet, the Delta of Copper River, Bering Sea and the waters tributary thereto, and we believe that the indictment, in order to be sufficient, should have shown that the traps complained of were within prohibited waters.

See *State v. Turnbull*, 78 Me. 392; 6 Atl. 1.

U. S. v. Wood, 159 Fed. 187; 168 Fed. 438.

U. S. v. Britton, 107 U. S. p. 655.

So much for the demurrers and objections to the introduction of any evidence made at the time plaintiff opened its case.

MOTION FOR NON-SUIT OR INSTRUCTED VERDICT

(Assignment of Error No. 4.)

As stated heretofore the above mentioned motion which was made at the close of plaintiff's case in substance raises the same objections to the indictments as the demurers and, in addition thereto, the insufficiency of the evidence to sustain a verdict of guilty. Therefore, in consideration of this motion we will, in the first place, ask the court to apply the foregoing argument made in support of our demurers in support of this motion, and we will now proceed to present our reasons why we think that plaintiff's evidence will not support the verdicts of guilty.

The consolidated case was tried by plaintiff on the theory that it was only necessary for it to prove two things, or one of two things, in order to secure a conviction, that is:

First, The failure of defendant during the weekly close season to have 25 feet of the webbing of the heart next to the pot lifted or lowered vertically in a rectangular shape; or

Second, The failure of the defendant during the weekly close season to have the tunnel of said trap closed; or, the failure of the defendant to comply with both of the last mentioned conditions. (P. R. 165-169.)

This is the view that the trial court also took of the case as will conclusively appear from one or more of the instructions given to the jury by the court, which will hereafter be referred to. There was no evidence offered on any other phase of the case pertaining to the condition of the traps above mentioned except evidence to support the defendant's violation of one or both of the above named conditions.

While the fish warden Mr. Walker was upon the witness stand the District Attorney propounded the following question pertaining to one of the fish traps of the defendant:

Q. Will you state whether or not you saw the trap fishing at that time?

An objection was interposed by counsel for the defendant to the question on the ground that there was no allegation in the indictments, or any of the counts thereof, that any of the traps were fishing at the time it is claimed the defendant violated the law, and this objection was by the court sustained. (P. R. 269-271.)

Should the court hold that these provisions of the statute are merely directory, then the motion for a directed verdict or non-suit should have been granted. On the other hand, should the court hold that these provisions of the statute are mandatory and the violation of either one or both charges a crime, still, at the time plaintiff rested its case, it was not shown that twenty-five feet of the webbing or net of the heart of any of the traps next to the pot were

not so lifted or lowered in such a manner as *to permit free passage of salmon and other fishes*. We contend under any circumstance it was incumbent upon the plaintiff to show that the way the traps in question were found at the time it is alleged that defendant violated the law were in such a condition to obstruct the free passage of salmon and other fishes. At the time the plaintiff rested its case there was not a word or syllable of proof of any kind that any of the traps complained of were ever found in a condition to prevent the free passage of salmon and other fishes. However, as contended in other parts of this brief, we think that the provisions of the statute under discussion are simply directory, but for argument's sake have assumed that the view that the trial court took of the law is correct, and then contend that the motion for non-suit should have been granted for the following reasons:

a. The entire absence of proof or any evidence to show that the traps complained of were in prohibited waters of Alaska.

b. That there was no evidence or proof to show that the defendant did fish for, take or kill any salmon of any species during the weekly close season prescribed by the statute.

c. Should the court consider the parts of the statute under consideration mandatory and not directory, then there was no evidence to show that the defendant had

not closed the mouth of the tunnel of the traps complained of, or had not lifted the webbing of the heart next to the pot in such a manner as to permit the free passage of salmon and other fishes.

d. There was no proof to show that any of the traps were fishing at the time of the alleged violation of the law.

Hence we claim that the trial court erred in not granting defendant's motion for non-suit or a directed verdict.

II.

ERROR IN THE COURT REFUSING TO GIVE TO THE JURY CERTAIN INSTRUCTIONS REQUESTED, AND IN GIVING TO THE JURY CERTAIN OTHER INSTRUCTIONS

(Assignment of Errors Nos. 5, 6, 7, 8, 9, and 10.)

In requesting the trial court to give certain instructions to the jury we followed out the court's interpretation and theory of the law concerning the raising or lowering of the webbing of the walls of the heart, and the closing of the tunnels of the traps referred to in the indictments. That is, we assumed that the defendant had to conform to these requirements of the law in such a manner as to permit the free passage of salmon and other fishes to their spawning grounds, and also further assumed that

a violation of these provisions of the statute to prevent this free passage of salmon and other fishes is a crime.

We submit to this Honorable Court, if the trial court's interpretation and theory of the law is correct, and we assumed that it was upon the tendering of certain instructions, then these tendered instructions should have been given, and it was error in the court to deny them.

We have set forth defendant's requested instructions in full in this brief, and need only to briefly refer to them in our argument.

We contend that requested Instructions Nos. I. and II. should have been given as they are a correct statement of the case and the law according to the court's interpretation of it. That is, that under such circumstances it is only necessary for the defendant to raise, open or lower the webbing of the walls of the heart and to close the tunnel in such a manner so as to permit the free passage of salmon and other fishes to their spawning ground.

Instructions Nos. III. and IV., tendered by the defendant, should have been given for the same reasons that Instructions I. and II. should have been given by the court, our contention being that the statute does not mean that twenty-five feet of each wall of the heart of the traps in question should be raised or lowered in any particular manner except in a way to permit the free passage of salmon and

other fishes so that they may go through the trap without materially being obstructed.

Requested Instruction No. V. refers to both the raising or lowering of the webbing of the heart of the traps and the closing of the tunnels during the weekly close season, and states that if this was done in such a manner as to permit the free passage of salmon and other fishes and not obstruct their run that then the requirements of the law were fulfilled.

Surely, if the defendant did not fish for, take or kill any salmon of any species and closed the gate, mouth or tunnel and lifted or lowered the webbing of the hearts of its traps in such a manner as to permit the free passage of salmon and other fishes, it committed no crime.

Outside of the court's instructions being extremely argumentative, we particularly objected and excepted to the instruction or instructions set forth in Specification of Error No. 10. The first part of the instruction is as follows:

“It is not a matter of any importance in this case what a man by the name of Bower may have interpreted the law to be. It is not a matter of importance in this case, so far as my functions are concerned, how a man named Cobb may have interpreted this law. It is not a matter of importance how the Department itself may have interpreted this law. It is a question of what I think the language—what I think the law means,

and whatever I think it means, and what I tell you it means, you must accept as the law of the case."

It appears from the evidence in the case, and we do not think that the plaintiff will deny it, that a man by the name of Bower and also that a man by the name of Cobb were predecessors in office of Mr. Walker, the latter being the fish warden at the time the acts complained of in the indictment took place, and it will further appear in evidence that both Bower and Cobb who were interested with the execution of the law permitted the defendant in this case prior to the year of 1914 to raise and lower the webbing of the walls of the heart and to close the tunnel in the same manner that the defendant was doing at the time of the acts complained of in the indictments. If the statute under which these indictments were found provides for the appointment of just such officers as Bower and Cobb, and if they were fish wardens to see that persons who were engaged in fishing in Alaskan waters should not violate the statute in question, and if the construction put upon the statute was tantamount to a departmental construction, the instruction of the court given is erroneous and prejudicial to the defendant.

It is stated in one of the early cases:

"It is a well settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great

weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

U. S. v. Johnson, 124 U. S. 236;
to the same effect are the cases of
U. S. v. Eaton, 169 U. S. 343;
U. S. v. Watton, 50 Fed. 694;
N. P. R. Co., v. U. S. 36 Fed. 285;
Johnson v. Morris, 72 Fed. 896.

Numerous other cases could be cited upholding the doctrine contended for. In one of the first cases on departmental construction Mr. Justice Trumbell said that in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

Edwards v. Dearby, 12th Wheat. (U. S. 210).

Judge Brewer tracing the growth of this principle of our law observed that:

"From the time that Judge Trumbell announced it so cautiously in 1887 it has gained strength every time it was again considered by the court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before."

In the case of *U. S. v. North Carolina State Bank*, 6 Pet. (U. S. 39) it is stated:

“Uniform interpretations by the executive department is entitled to very great respect.”

Again in *Peabody vs. Stark*, 16 Wall. (U. S. 243).

“* * * * would of itself furnish strong grounds for a liberal construction.”

In the case of the *U. S. v. Moore*, 95 U. S. 760, the court states:

“In the absence of a clearer conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we are inclined to adopt the uniform ruling of the office of the Internal Revenue Commissioner.”

Again in *U. S. v. Pugh*, 99 U. S. 269, the court says:

“It ought not to be overruled without cogent reasons.”

Again it is stated:

“In the highest degree persuasive if not absolutely controlling in its effect.”

In *Pennoyer v. McConnaughy*, 140 U. S. 22, the court states:

“* * * * Should ordinarily control the construction of the statutes by the courts.”

Again, under the Instructions or Instruction complained of in Assignment of Error No. 10, the Court told the jury, among other things, in referring to the webbing of the heart, and the manner in which it should be lifted or lowered:

“Suppose that the window pane were actually in two separate parts so that each part could be lowered or raised and each part was twenty-five inches wide. I ask you to please lower or raise twenty-five inches of that window next to the wall. (Indicating). I cannot see how it means anything but I am asking you to raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that way. I am asking you to raise or lower it * * * *.” etc.

This instruction is ambiguous to say the least, and evidently conveys to the jury the impression that the webbing had to be lowered or raised a width of twenty-five feet vertically from the top to the bottom of the walls of the heart, whereas the instruction should have been in the language of the statute, “so raised or lowered as to permit the free passage of salmon and other fishes.” Had this latter kind of instruction been given to the jury there could have been but one result, and that is, a verdict of not guilty because the uncontradicted evidence in the case shows that in all instances complained of the webbing of the heart was so raised or lowered so as to permit the free passage of salmon and other fishes.

See testimony of:

Forbes p. 280; *Keegan* p. 282-294.;

Nelson p. 299; *Davis*, p. 307.

III.

ERROR IN THE COURT RECEIVING AND FILING OVER OBJECTIONS OF DEFENDANT THE THREE VERDICTS HEREIN.

(Specification of Error XI.)

ERROR OF THE COURT IN OVER-RULING DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS RENDERED, OR TO CONSIDER AND TREAT THEM AS VERDICTS OF ACQUITTAL.

(Specification of Error XII.)

ERROR OF THE COURT IN OVER-RULING THE MOTION FOR NEW TRIAL.

(Specification of Error XIII.)

ERROR OF THE COURT IN RENDERING JUDGMENTS HEREIN AND IMPOSING FINES UPON THE DEFENDANT.

(Specification of Error XIV.)

The foregoing Specifications of Error may be combined for consideration.

After the jury had deliberated on this verdict, they came into Court. The question was asked by Judge Jennings "as to whether the jury had agreed on verdicts," and the Foreman, A. A. Gabbs, declared that we had, and asked Judge Jennings in open

Court as to whether it were possible for us to make any recommendations qualifying or amending the verdict. The Judge asked as to what recommendations or qualifications were wanted, and the Foreman thereupon made the statement that, "while we believed the defendant had not complied with the letter of the law, still we felt that it had complied with the spirit of the law." At that time, Judge Winn rose and asked for the Court Stenographer, as he wanted a record of the statement, and Judge Jennings refused to call the Stenographer, and said to Judge Winn substantially "I will not order the Court Stenographer to take such a statement," and then, speaking towards the jury, Judge Jennings said, "What you mean is a recommendation to the Court for mercy, and if so, you may write it in your verdict," or words to that effect. Thereupon, in open Court, the Foreman wrote in each verdict a recommendation for clemency of the Court, and handed the verdicts to the Clerk. Afterwards, Judge Winn rose, and opposed the receiving and filing of the verdicts, and asked to have the jury polled, and again called for the Court Stenographer. At that time the Court Stenographer appeared. After the jury was polled, Judge Jennings, turning to the said Foreman of the jury, said, "Now you may make the statement you did on bringing in your verdict," or words to that effect, and the Foreman repeated substantially his original statement to the Court.

It is of first importance to determine the nature and legal effect of this verdict. There was a finding of fact by the jury as follows:— “We think that, while the defendant has violated the letter of the law, it has not violated the spirit of the law.”

Record p. 327.

(1) Was the finding of the jury a special verdict, and was it within the province of the jury to find such a special verdict?

(2) What was the force and effect of the special finding of fact of the jury upon the general verdict?

(3) What is the duty of the Court in the reception of the special verdict, coupled with the general verdict, and was there error shown in the remarks and instructions in regard to the special finding in question?

Chapter 16 of the Criminal Code of Alaska, commencing at page 731 of the “Compiled Laws of the Territory of Alaska” pertaining to verdicts, comprising Sections 2268 to 2272 inclusive, presents no special form of verdict. Section 2262 provides that “although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound nevertheless to receive as law what is laid down as such by the Court; but all questions of fact, other than those mentioned in the last Section, must be decided by the jury, and all evidence thereon addressed to them.”

Section 1038 of “Compiled Laws of the Territory of Alaska” and the Civil Code prescribe as follows:—

“When a special finding of fact shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly.” A special verdict need not be in any particular form.

12 Cyc 689

A verdict need not be in writing unless this is required by statute, and even when writing is expressly required by statute, an oral verdict is not necessarily void.

12 Cyc 689

Ellis v. State, 18 Southwestern 139

Hart v. State, 19 Ohio 579.

A verdict need not be signed by the Foreman or by the Jurors.

12 Cyc 689

In (1,) no form of verdict having been prescribed by the Criminal Code of Alaska, and a statute not having prohibited the finding of special verdicts, it was lawful and proper for the jury, under common law practice, and rules of procedure, to make special findings and to bring in a special verdict; this principle is recognized by Section 1038 last above quoted.

We think the jury had authority to find a special verdict, and that the finding made by the jury that, while the defendant “*had violated the letter of the law, it had not violated the spirit of the law,*” was tantamount to a special verdict and special finding of the jury, and that it is the duty of the Judge, where the verdict is special, to declare the law and instruct

the jury touching the form of their verdict under such finding. If guilty, that should be the form of the verdict; if not guilty, the finding in itself stands as an acquittal. If the findings are defective, the jury should be so instructed, and they should be requested to retire for further deliberation; or if the jury has been discharged, to award a new trial.

At common law, the jury may give a special verdict in all felonies. By this verdict, the facts are found by the jury and become a part of the record, and questions of law are submitted to the Court to be decided.

12 Cyc 690

Underwood v. People, 32 Mich. 1

20 Am. Rep., 633;

Commonwealth v. Eichelberger, 119

Pa. State 254, 4 Am., St. Rep. 642;

13 Atl. 422;

Commonwealth v. Chathams, 50 Pa.

State 181

McGuffie v. State 17th Ga. 497.

State v. Savage, 36 Ore. 191.

60 Pac. 610;

61 Pac. 1128;

State v. Moore, 29 N. C., 228

It is held in the *Underwood* case *supra* that a special verdict was not unauthorized at common law. *Commonwealth v. Chatham supra*, the Court said:—"The jury have a right in all cases whatsoever,

whether capital or otherwise, to find a special verdict, by which the facts of the case are put on record and the law submitted to the judges."

In *State vs. Morris* supra, the Court says:—"The court must say upon the facts found (in a special verdict) that in law they constitute or do not constitute the offense charged, and thereupon the verdict of the jury is entered in accordance with opinion of the Court."

State v. Bray, 89 N. C. 480

"The court can add nothing to this finding. They can draw only the legal conclusions from the facts found. No facts can be inferred by the court which the jury have not inferred and set forth, especially against the defendant in a criminal case."

People v. Wells, 8 Mich., 103

In the case of *People v. Piper*, 50 Mich., 390, there was rendered a general verdict of Guilty, and attached to it was a special verdict. The Court held that under the special finding, notwithstanding the verdict of Guilty, there should be no judgment entered upon the general verdict, and the proceedings were set aside and the defendant discharged. Where a special verdict in a criminal case finds that the de-

12 Cyc 689.

fendant had committed only part of the acts essential to the proof of the commission of crime, and that the principle element thereof was wanting, such verdict was equivalent to an acquittal.

State v. Stephanus 53 Ore. 135;

99 Pacific 429

This is a late case and worthy of consideration and weight, as we have not been able to find any difference in the Statutes of Oregon and those of Alaska pertaining to criminal procedure and verdicts. It is further held that in the *Stephanus* case, where special facts found are true, there must be sufficient to establish the guilt of the accused of the crime charged, in the absence of which, the same result must follow as in a failure to find a defendant guilty under general verdict. In this case there was a general verdict of guilty attached to the special verdict, and the Supreme Court set aside the judgment of conviction, and ordered the Court below to discharge the defendant, holding, further, that nothing can be added to a special verdict by inference, and when it omits to set forth any facts essential to constitute the crime charged, it amounts to an acquittal.

If the case be taken out of the Statute by a finding of fact in a special verdict, it is an error to instruct on the law and direct the jury to reconsider their verdict.

Duncan v. State, 49 Miss. 331

A special verdict professes to find all the material facts which have been proved to the satisfaction of the jury, and concludes that, if upon the facts so found, the Court should be of the opinion the defendant is in law guilty, then the jury find him Guilty; but if upon the facts thus found, the Court should be of the opinion that defendant is not in law guilty, then they find him Not Guilty.

28 Fed. Cas. No. 16649, p. 480, 1st Col.

We think that the foregoing authorities have established without any question *that the finding of the jury was a special verdict*, and it was within the province of the jury to find such special verdict, and, furthermore, that the special finding of the jury should control the general verdict. What, then, was the duty of the Court in the reception of a special verdict of the kind in question, coupled with the general verdict, and was it not error in the Court requesting the jury to modify its verdicts in the manner in which he did?

The special fining of the jury is "We think that, while the defendant has violated the letter of the law, it has not violated the spirit of the law." What is meant by the "spirit of the law?"

"The principle of life and vital energy."

The new Standard Dictionary of English Language.

"The breath of life, life or life principle."

Webster's New International Dictionary.

In *Holy Trinity Church v. U. S.* 143 U. S. 459, Mr. Justice Brewer said, "It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit." In this case, the Court held that, although the Act of Congress expressly forbade the importation of any alien, under any contract of agreement, to perform labor, or services *of any kind*, in the United States, its territories or districts, that this

prohibition did not apply to the importation by an American church of a foreign clergyman under a contract to enter its services as rector or pastor, as such importation on a contract, while indeed a violation of the *letter of the law*, *did not constitute a violation of the spirit of the law, and therefore was not within the statute.*

U. S. v. Buchanan, 9 Fed. 690.

The Court stated, among other things. "We must consider the object and spirit of the statute, and try to ascertain from the language of the whole, and every part of the statute, what was the intent and purpose of the Legislature in making the statute.

* * * * When ascertained, the intent, should be followed with reason and discretion though such construction *may seem contrary to the letter of the statute.*" See also to the same effect, *Murray v. New York Central R. R. Co.*, 3 N. Y. Reports 341.

In *Treat v. White*, 181 U. S. 267, Mr. Justice Brewer said: "We do not question the fact that there are times when the mere letter of the statute does not control, and that a fair consideration of the surroundings may indicate that which is within the letter is not within the spirit, therefore must be excluded from its scope."

See also *Heydenfelt v. Denny*, 93 U. S. 634, *National Waterworks Co. v. Kansas City* 65 Fed. 697.

We could cite numerous other cases following the general rule laid down by the cases just quoted, but

do not think it is necessary, as we do not believe that the doctrine which we contend for, and which is established by the foregoing authorities, can be successfully contradicted or denied.

It will now be in order to consider the force and effect of the special finding and the duty of the court in this connection.

At a particular stage of the trial, before the verdict was handed in, the court interfered. It

(1) refused to enter the verdict of the jury as announced;

(2) It gave an erroneous instruction to the jury, viz.: it instructed the jury that its finding was in reality the equivalent of a recommendation for mercy or clemency, instead of its real meaning;

(3) It further instructed the jury to enter a verdict of guilty, with recommendation to the court for mercy or clemency;

(4) It refused to instruct the jury that the real meaning and significance of their finding was the equivalent to a verdict of Not Guilty;

(5) The trial court usurped the function of the jury from the moment the jury entered the court room, and dictated their verdict, and refused to enter their real verdict.

The function of the court is simply to instruct the jury and to conduct the trial in an orderly manner. The functions of the jury are to try the case upon the evidence and the law, as given by the court, but if the instructions or directions of the court are

erroneous, there is no trial. If the court steps in and dictates a verdict which is not the true verdict of the jury, but to the contrary, it is more than a mistake.

The jury in this case had concluded their deliberations, and had virtually found the defendant Not Guilty; but laboring doubtless under a mistake, they had written a verdict absolutely the opposite of their true finding. Before that verdict was presented, the jury informed the Court of their real finding. They asked the court if they could modify their verdict as written. This was done before the verdict was handed in, and then and there we claim that the court stepped in and modified the verdict against the finding of the jury, and did this in open court, without having the jury retire for further consideration of the case. This, we claim, was a usurpation of the rights of the jury, and rendered the proceedings a nullity. The course of procedure in this case was the same as if the verdicts of the jury were merely advisory, and not binding upon the court, and the court should have treated them as advisory and set the verdicts of "Guilty" aside. The jury are the sole judges of the facts, and they alone may write their verdict and deliver it to the court. In the case at bar, they neither wrote the verdict entered, nor delivered it. The court exercised this function, and we contend the jury had found a different verdict, but this the court refused to hear. The jury had found that defendant *had not violated the spirit of the law*, and hence we contend under authorities there could be no conviction.

The trial by a jury in the exercise of its duty and functions in any case continues up till the time its verdict is entered and the jury discharged. See Sections 1025-1034 of "Compiled Laws of the Territory of Alaska." Hence, interference by the Court with the jury, or directing the jury what it should do or should not do, before the verdict was received, filed and entered, was error. "A verdict of acquittal cannot be set aside, and therefore if the court can direct a verdict of Guilty, it can do indirectly that which it has no power to do directly."

U. S. v. Taylor, 11 Fed. 471.

Jury should not be coerced to agree upon a particular verdict or any verdict.

People v. Faber, 199 N. Y. 256,
92 N. E. 674.

Here in the case at bar, the trial judge should have instructed the jury that the special verdict was the equivalent of acquittal. The defendant should have been discharged on the court's own motion and defendant's motion not to enter the general verdict of Guilty, and its subsequent motion to discharge defendant, should have been allowed.

Independent of the question as to whether or not the jury returned a special verdict specifically acquitting the defendant for the crime charged in the indictment, the record in this case presents another question for the consideration of this court, which, although essentially fundamental in its nature, does not seem to have ever been raised upon a similar

state of facts or under circumstances identical with those under which it comes before the court at the present time, as the record in the case at bar shows that in this case, in our judgment, the trial court absolutely directed the jury to find the defendant Guilty.

In most of the cases in which this question has been directly adjudicated by the courts of the United States, it has arisen where the appellate courts have been called upon to decide whether or not certain language used by the trial courts in instructing the jury did not amount to an instruction to find defendant guilty, or whether or not, under circumstances surrounding a given case, the jury might not be impelled to interpret such instruction as a direction to them to find the defendant guilty. In these cases, whenever the appellate courts have decided that the language used by the trial court amounted to the direction of a verdict of Guilty, or might, under the circumstances, have been reasonably considered as such a direction to the jury, they have invariably set the verdicts aside, and awarded new trials, upon the ground that the defendant's constitutional rights had been impaired. In the case at bar, the question has not been raised under circumstances corresponding to those in any of the above enumerated cases.

The circumstances under which this defendant contends that it was deprived of its constitutional right of trial by jury, are fully shown by the uncon-

troverted affidavits of the jurors set out in the record in support of the Motion for New Trial.

Record p. 333-337.

The court, instead of informing the jury that if this was their finding it was their duty to sign the verdict acquitting the defendant, or having a verdict entered corresponding to the finding of the jury, refused to allow the statement to be recorded at that time by Court Stenographer, and then told the jury in substance that what they meant was a recommendation for leniency and directed them to write such recommendation into the blank verdict of Guilty, prepared by the District Attorney.

In conclusion, we contend that the jury, by its finding that the defendant had *complied with the spirit of the law*, and was therefore not guilty of the violation of the spirit of the law, did not find the defendant guilty of one of the most essential elements of the crime charged, and its finding that the spirit of the law had not been violated was essentially a finding of Not Guilty, as it served to absolutely negative the effect of the existence of this most essential requisite of the offense charged, and comes directly within the doctrine of the cases cited in this Brief. When the jury reported this finding in open court, we contend it became the duty of the presiding judge, either upon the motion of Counsel, or independent of motion of Counsel, to instruct the jury that, if they believed that the defendant had not been guilty of a violation of the spirit of the law, it was

their duty to return a verdict of Not Guilty in each case.

The court had no power to peremptorily instruct the jury the kind of verdict it should find for, we believe that his actions in the premises were equivalent to a direct instruction to the jury to find the defendant guilty when it was shown by the actions of the jury and the special finding made that the defendant was not guilty. See case of

U. S. v. Taylor, 11 Fed. 470;

Atchison T. & S. F. Ry. Co., v. U. S.

172 Fed. 195.

In the latter case, among other things, the court states:

“For if it be a criminal offense, plaintiff in error was entitled to the verdict of the jury respecting its guilt or innocence—not a verdict in form only but a verdict expressing the real verdict of the jury; for such is the guarantee of the Sixth Amendment to the Constitution of the United States.

(Citing *U. S. v. Taylor*, 11 Fed. 470;

Star v. U. S. 153 U. S. 625;

38 L. Ed. 841.)

The learned judge, after first determining that this was a criminal prosecution, as distinguished from a civil suit, to recover a penalty set the verdict aside on the ground that the trial court had infringed upon the constitutional right to a trial by jury.

In the case of *Dolan vs. U. S.* 123 Fed. 52 which came before this Honorable Court upon a rehearing of an appeal from Alaska, Judge Hawley, in discussing the right of the judge to invade the province of the jury by its instructions, says:

“We are of the opinion that the court invaded the province of the jury in the giving of this instruction, in this: that it assumed as an established fact that Misener made the statement testified to by Palmer instead of leaving this question of fact to be decided by the jury, contrary to the well settled principle of the law and in direct opposition to the provisions of Section 157 of the Penal Code of Alaska,” (being Sec. 2266 of the Compiled Laws of the Territory of Alaska.)

See also *State v. Hatcher*, 44 Pac. 584.

In *Star vs. U. S.*, 153 U. S. 614, Chief Justice Fuller said, among other things, in discussing the respective duties of the court and the jury (page 626):

“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight and that his slightest word or intimation is received with deference and may prove controlling, etc. * * * * .”

“The court could not, consistently with the constitutional right of trial by jury sub-

mit part of the facts to the jury and itself
determine the remainder. * * * * .”

Thomas v. American, etc. Land Co.

47 Fed. 550.

On this point see also

Breese v. U. S., 108 Fed. 804;

Georgia v. Braisford, 3 U. S. 4;

Stimus v. U. S., 24 Fed. Cas. No. 13387;

Thomson v. Utah, 110 U. S. 574.

By reason of the errors complained of and set forth, committed by the trial court, and from the authorities cited in support of our contention herein, we therefore respectfully submit that the three judgments of the court entered in this consolidated case should be set aside, and an order made directing the trial court to enter the verdicts of the jury as verdicts of acquittal, or that the motion for new trial herein should be granted.

Respectfully submitted,

M. G. MUNLY,

ROBERT N. MUNLY, and

WINN & BURTON,

Attorneys for Plaintiff in Error.

No. 2623

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,
Plaintiff in Error

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error from the United States
District Court for the District of
Alaska, Division No. 1

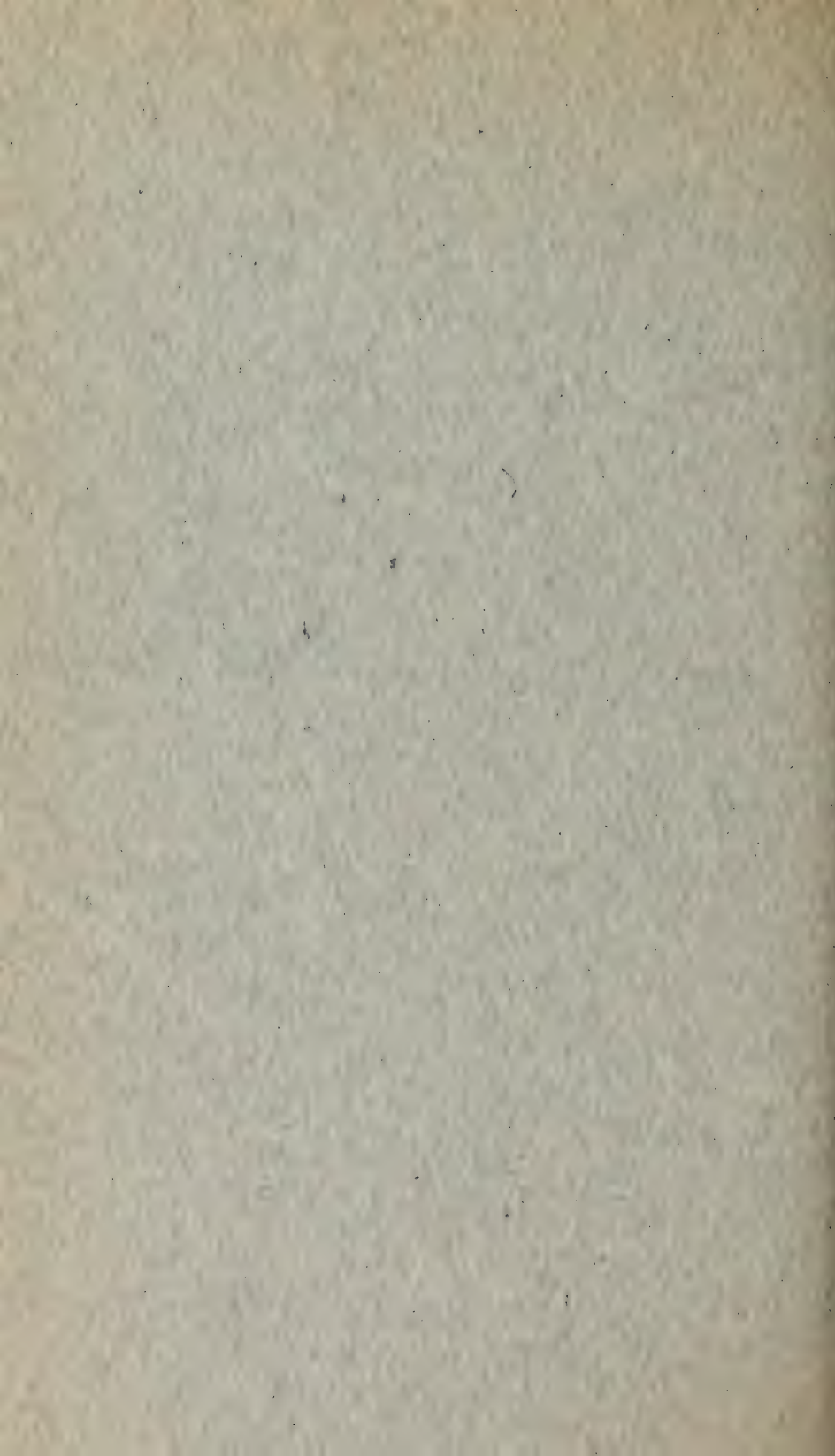
JAMES A. SMISER,
United States Attorney.

JNO. J. REAGAN,
Assistant U. S. Attorney.
Attorneys for Defendant in Error

Filed

MAY 10 1913

F. D. Monahan,



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THE CASE.

The defendant, the Thlinket Packing Company, a corporation owning and operating certain fish traps located within Division Number One of the District of Alaska during the year 1914, was indicted in three cases being Nos. 1034-B, 1035-B, 1036-B, at August Term, 1914, of District Court, Division Number One, of Alaska for violating Section 5, Act June 26th, 1906, entitled "An Act for protection of the Fisheries of Alaska," by unlawfully and wrongfully maintaining and operating said traps "during the close seasons," to-wit, between the hours of "six o'clock post-meridian on Saturday and six o'clock ante-meridian on Monday" on the dates and at the places set out in said indictments, said violations consisting of a failure on its part to observe the provision of said statute, wherein it is made "unlawful to fish for, etc. * * * in any manner by any means, except by rod, spear or gaff, etc.," and it is further provided that during the "weekly close season herein prescribed *the gate, mouth, or tunnel of all stationary and floating traps shall be closed and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such a manner as to permit the free*

passage of salmon and otherfishes," said indictments charge that said company *did maintain and operate said traps for fishing* during the close season on the dates and at the places mentioned *and did fail to close the tunnels of said traps and fail to either lift or lower the twenty-five feet of webbing* as required by said statute, as set out in said indictments. Tr. pp. 2-8, 10-12, 15-22.

THE LAW VIOLATED.

ACTS OF CONGRESS.

(34 St. p. 479.—Compiled Laws of Alaska, Sec. 263.)

These indictments are drawn under the provisions of the fifth section of the Act of Congress approved June 26th, 1906, entitled "An Act for the protection and regulation of the Fisheries of Alaska," which section reads as follows:

"Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by rod, spear, or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock post meridian Saturday of each week until six o'clock ante meridian of the Monday following, or to fish for, or catch, or kill in any manner or by any ap-

pliance except by rod, spear, or gaff any salmon in any stream of less than one hundred yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day in the week. Throughout the weekly close season herein prescribed the gate, mouth, or tunnel of all stationary and floating traps shall be closed and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such a manner as to permit the free passage of salmon and other fishes."

(34 St., p. 479; sec. 263 Comp. L. A.)

By this section, among other things, a weekly "close" season is established against fishing by means of "traps," which season begins at six o'clock P. M. on Saturday of each week and continues until six o'clock A. M. of the Monday following, during which time the Act (1) makes it unlawful for "any person, company, corporation, or association" to fish for salmon by any means except by "rod, spear, or gaff" in the waters of Alaska except in the waters of Bering Sea, the Delta of the Copper River, and Cook Inlet, and (2) *commands that the gate, mouth, or tunnel of all stationary and floating traps shall be closed and that twenty-five feet of the webbing or net of the "heart" of such traps on each side next to the "pot" shall be*

lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

Pursuant to Section 11 of said Act (34 St. p. 480; 269 Comp. L. A.), the Secretary of Commerce, prior to the year 1914, made, established and published among others the following rule and regulation:

“All persons, companies, or corporations owning operating, or using any trap net, pound net, or fish wheel for taking salmon or other fishes shall cause to be placed in a conspicuous place on said trap net, pound net, or fish wheel the name of the person, company or corporation owning, operating, and using same, together with a distinctive number, letter, or name which shall identify each particular trap net, pound net or fish wheel, said lettering and numbering to consist of black figures and letters, not less than six inches in length, painted on white ground.”

Complying with the above rule, the traps of this plaintiff in error, so many of them as are involved in this litigation, were marked “T. P. Co. No. 1” up to and including “T. P. Co. No. 12.”

Section 13 of the same Act of Congress provides:

“Sec. 13. That any person, company, corporation, or association violating any of the provisions of this Act or any regulation estab-

lished in pursuance thereof shall, upon conviction thereof, be punished" as therein provided.

(34 St. p. 481; 271 Comp. L. A.)

CHARGES IN THE INDICTMENTS IN SHORT.

The first indictment (No. 1034-B) has six counts.

1st Count.

The first count charges that the plaintiff in error, a corporation then and there organized and existing as such, between the hours of six o'clock post meridian on Saturday, July 11, 1914, and six o'clock ante meridian on Monday, July 13, 1914, to-wit, on Sunday, July 12, 1914, in the waters of Icy Straits, near the mainland, abreast of Porpoise Island, Excursion Inlet, the same being the waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap known and designated as "T. P. Co. No. 1," without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

2nd Count.

The second count charges that during the same periods of time and on the same date and at

the same place said plaintiff in error was guilty of the same violation of law in regard to "T. P. Co. No. 2."

3rd Count.

The third count charges the same offense on the same date and in the same place in regard to "T. P. Co. No. 3."

4th Count.

The fourth count charges that on the same date and at the same place as set out in counts Nos. 1, 2 and 3 plaintiff in error did unlawfully and wrongfully maintain and operate for fishing a certain trap known and designated as "T. P. Co. No. 4" without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

5th Count.

Count No. 5 charges the same offense at the same time as set out in Count No. 4, in the waters of Icy Straits, mainland shore north of The Sisters, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 5."

6th Count.

Count No. 6 charges the same offense as set out in Counts Nos. 4 and 5, on the same date, in the waters of Icy Straits off the mainland near Ansley Island, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of said District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 6."

THE SECOND INDICTMENT.

The second indictment (No. 1035-B) has two counts.

1st Count.

The first count charges that the plaintiff in error, between the hours of six o'clock post meridian on Saturday, August 8, 1914, and six o'clock ante meridian on Monday, August 10, 1914, to-wit, on Saturday, the 8th day of August, 1914, within the water of Chatham Straits, west shore Admiralty Island, north of Funter Bay, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of the said District of Alaska and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap known and designated as "T. P. Co. No. 11" without having twenty-five feet of the webbing or net of the heart of such trap on each side next to

the pot thereof lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

2nd Count.

Count No. 2 charges the same offense at the same time and "in the waters of Lynn Canal, west shore of Admiralty Island, south of Point Retreat, the same being the waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of this Court," in regard to "T. P. Co. No. 12."

THE THIRD INDICTMENT.

The third indictment (No. 1036-B) has seven counts.

1st Count.

The first count charges plaintiff in error, between the hours of six o'clock post meridian on Saturday, August 8, 1914, and six o'clock ante meridian on Monday, August 10, 1914, to-wit, Sunday, the 9th day of August, 1914, in the waters of Icy Straits, near the mainland, abreast of Porpoise Island, Excursion Inlet, the same being waters of Alaska over which the United States has jurisdiction, and in the First Division of the said District of Alaska, and within the jurisdiction of this Court, did unlawfully and wrongfully maintain and operate for fishing a certain trap, known and designated

as "T. P. Co. No. 1," without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lower in such manner as to permit of the free passage of salmon and other fishes.

2nd Count.

The second count charges plaintiff in error with violating said law at the same time and place mentioned in Count No. 1, in regard to "T. P. Co. No. 2."

3rd Count.

The third count charges a violation of the law at the same time and place as mentioned in Counts Nos. 1 and 2, in regard to "T. P. Co. No. 3."

4th Count.

The fourth count charges the plaintiff in error with the same violation of said law, on the same date and at the same place as mentioned in Counts Nos. 1, 2 and 3, in regard to "T. P. Co. No. 3-A."

5th Count.

The fifth count charges plaintiff in error with the same violation of law, at the same time and place as mentioned in Counts Nos. 1, 2, 3 and 4, in regard to "T. P. Co. No. 4."

6th Count.

The sixth count charges plaintiff in error with having violated the same law, at the same time mentioned in Counts Nos. 1, 2, 3, 4 and 5, in the

waters of Icy Straits, off the mainland near Ansley Island, the same being waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 6."

7th Count.

Count No. 7 charges plaintiff in error with the violation of the same law at the same time as mentioned in Counts Nos. 1, 2, 3, 4, 5 and 6, in the waters of Icy Straits off Entrance Island near Point Couverden, the same being the waters of Alaska over which the United States has jurisdiction and in the First Division of the District of Alaska and within the jurisdiction of this Court, in regard to "T. P. Co. No. 9."

DEMURRERS TO THE THREE INDICTMENTS

To these three indictments, and to each count thereof, the plaintiff in error filed three separate demurrers, as set out in transcript pp. 22-30, 32-34, 36-43.

To indictment No. 1034-B there are assigned eight grounds of demurrer.

To indictment No. 1035-B four grounds.

To indictment No. 1036-B nine grounds.

FIRST INDICTMENT

GROUNDS OF DEMURRER TO INDICTMENT

No. 1034-B.

I.

That more than one crime is charged in said indictment against defendant.

II.

That said indictment does not state facts sufficient to constitute any crime against defendant.

In substance:

III.

(a) "That facts stated in Count One do not constitute a crime against defendant company,"—quoting the language of Count One.

(b) That said charge in said Count (One) is duplicitous and ambiguous and attempts to charge two crimes and does not substantially conform with the requirements of Chapter 7, Compiled Laws of the Territory of Alaska, being subdivision two, section 2147, of said Compiled Laws, in that the statement of facts in Count One and the other part of the indictment referring to Count One, is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

IV., V., VI., VII., VIII.

GROUNDS OF DEMURRER TO INDICTMENT
NO. 1034-B.

The 4th, 5th, 6th, 7th and 8th grounds of demurrer to indictment No. 1034-B are identical with the third count but aimed at separate counts, except the 6th, 7th, and 8th grounds also include a further allegation that the respective counts mentioned charged more than one crime. This is simply a repetition of the first ground of demurrer and hence all these grounds, viz. IV. V., VI., VII. and VIII. are included in and the same as the first three grounds of demurrer, and will therefore be so treated.

Thus all these grounds of demurrer, viz. IV., V., VI., VII. and VIII. to indictment No. 1034-B., are embraced in the first three grounds and will be so considered, except as applicable to the various facts.

SECOND INDICTMENT

GROUNDS OF DEMURRER TO INDICTMENT
NO. 1035-B.

The four causes of demurrer to indictment No. 1035-B are the same as the first four causes of demurrer to indictment No. 1034-B, and will be treated as identical therewith, and need not be further noticed except as applicable to the various facts.

THIRD INDICTMENT

GROUNDS OF DEMURRER TO INDICTMENT

NO. 1036-B

The first three grounds of demurrer to the indictment No. 1036-B are identical with the first three in indictments Nos. 1034-B and 1035-B except that 3rd ground in No. 1036-B the first ground of demurrer among others is repeated, but is in substance the same and will be so treated.

The 5th, 6th, 7th, 8th and 9th grounds of demurrer to indictment No. 1036-B are identical within themselves but aimed respectively at counts 2, 3, 4, 5, 6, 7, 8 thereof and are also identical with the third ground of demurrer to indictment No. 1036-B. which is itself identical with the third ground of demurrer to indictment Nos. 1034-B and 1035-B. Therefore must all be treated the same.

RECAPITULATION

It therefore appears that causes of demurrer Nos. I, II and III are one and the same in all three indictments.

Cases of demurrer Nos. V., VI., VII. and VIII. to indictment No. 1034-B are no more than cause of demurrer No. III to said indictment, and are the same.

Causes of demurrer to indictment No. 1035-B

are the same as I, II, III and IV to indictment No. 1034-B.

Causes of demurrer Nos. IV, V, VI, VII, VIII and IX to indictment No. 1036-B are identical with causes or demurrer Nos. I, II and III in all the indictments.

THINGS EQUAL TO THE SAME THING ARE EQUAL TO EACH OTHER

Therefore causes of demurrer Nos. I, II and III are identical in all the three indictments and embrace all the other causes of demurrer in all three indictments. Therefore we need only discuss causes of demurrer I, II and III, in all the indictments.

BUT FIRST AS TO THE SUFFICIENCY OF THE INDICTMENTS.

The statute in question makes it unlawful to *fish for*, or kill any salmon, etc., during the prohibited season and prescribes what shall be done by operators of fish traps, viz. that the *gate, mouth or tunnel shall be closed and that twenty-five feet of the webbing or net of the heart of such traps on each side of the pot shall be lifted or lowered* in such a manner as to permit the free passage of salmon and other fishes.

Now the indictment charges just this offense,

viz., that the defendant during the prohibited season "did unlawfully and wrongfully

maintain and operate for fishing a certain trap known as Trap No. &c.—without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes."

Some counts further allege that "*without having the tunnel of such trap closed.*"

By all the authorities this allegation is entirely sufficient.

It charges the exact violation set out in the statute, i. e., *the unlawful fishing during the prohibited season* and it tells how that unlawful act was accomplished, viz. by *maintaining and operating said traps* during said prohibited season by failing to comply with the provisions of the law in that it failed to *either open the tunnel or lift or lower the webbing or net* in the manner provided by the statute, that is by *either lifting or lowering twenty-five feet of the same* as provided in the statute.

Had the indictment simply charged unlawful fishing during the close season without stating the manner in which the same was done the indictment would have been insufficient, for lack of description of the offense.

MANY MEANS

Many means of violating a statute may be set out in the statute, and so in the indictment, without making the same double. This is well recognized by all authorities.

“Some single offenses are of a nature to be committed by many means, or in one or another of several varying ways. Thereupon a count is not double which charges as many means as the pleader chooses, if not repugnant; and, at the trial, it will be established by proof of its commission by any one of them.”

Bish. New Cr. Proc. vol. 1, sec. 434
and authorities there cited.

“On Statutes. A statute often makes punishable the doing of one thing or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses.”

Indem, sec 436.

“Many acts,—if together they constitute but one offense, may be laid in one count. Thus,

—selling intoxicants to drunkards—it was not duplicity to aver, in one count, that on the specific day the defendant A did sell, and did offer to sell, by himself and by an agent, wines, spirituous liquors, and other intoxicating beverage to one B, addicted to habits of intoxication, said A knowing him to be so addicted, and B being also a common drunkard. For here but one offense appears.”

Idem, sec. 438.

DIFFERENT METHODS OF COMMITTING OFFENSE

“Where an offense may be committed by different means, a single count may charge all, and proof of any one will sustain the allegation. The limit is that the means must not be repugnant. Still, whether repugnant or not, the pleader may, if he prefers, employ a different count for each varying set of means, and he must do so [only] when they are inconsistent with one another.”

Idem, sec. 453, sub-sec. 2.

To the same effect Bishop on Statutory Crimes, sec. 224, is as follows:

“Provisions in the alternative are common in legislation; and the rule is, that whatever is within any one disjunctively connected clause is within the statute. Thus—

“Alternative Offenses.—If, as is common

in legislation, a statute makes it punishable to do a particular thing specified, 'or' another another thing, 'or' another, one commits the offense who does any one of the things, or any two, or more, or all of them. And the indictment may charge him with any one, or with any large number, at the election of the pleader; employing, if the allegation is of more than one, the conjunction 'and' where 'or' occurs in the statute. 'The rule,' it was once observed, 'is undoubtedly limited in its application to cases where the offenses created in a statute are not repugnant.' And, whatever be the form of the allegation, the proof need sustain only so much of it as constitutes a complete offense."

Bishop on Stat. Crimes, sec. 244
and authorities there cited.

SUBSTANTIAL REQUIREMENTS OF AN INDICTMENT

Mr. Bishop in his work on Criminal Procedure, discussing the elements of an accusation, first lays down the element of certainty and says:

"There are many reasons for it, helpful toward a comprehension of its degrees and force; as, to quote from DeGrey, C. J., that the defendant may know what crime he is 'to answer'; that the jury may appear to be

warranted in their conclusion of 'guilty' or 'not guilty' upon the premises delivered to them; and that the Court may see such a definite crime that they may apply the punishment which the law prescribes."

And further, the same authority gives another collection of reasons—is by Starkey given from the old books; thus,

"To identify the charge on which the grand jury proceeded, so that the trial shall be for the offense meant; to protect the accused from a second prosecution for the same offense;"

"To warrant the Court in granting or refusing any particular right or indulgence which the defendant claims as incident to the nature of the case;"

"To enable the defendant to prepare for his defense in particular cases, to plead in all;"

"To give him the means of submitting by demurrer the question of his guilt to the Court; to guide the Court in the punishment."

Idem, sec. 507.

"All facts which constitute the crime should be given, without inconsistency or repugnancy," but not necessarily more.

Idem, sec. 509.

"Words of the indictment,—except a few

technical terms, and those of a statute, if drawn thereon, will suffice if used in their ordinary and non-professional import."

Idem, sec. 509, sub-sec. 3.

Further quoting the same authority—

"The rule is, says Chitty, 'that where a matter is capable of different meanings, that will be taken by the Court which will support the proceedings, not that which would defeat them, and the language is properly to be construed 'in that sense in which the party framing the charge must be understood to have used it, if he intended his accusation to be consistent.' Such is the rule in all writings; namely, the Court leans to the interpretation which will make them effectual, avoiding what would render them null."

Idem, sec. 510, sub-sec. 2.

"The Exact Words of the Statute—will with rare exceptions be practically best; because thus all doubt will be avoided and simply the proof demanded by the law, and no more, will be called for by the indictment. Still, not always is such identity of words indispensable.

"We derive from all the results that it must employ so many of the substantial words of the statute as will enable the Court to see on what one it is framed; beyond which, it must have whatever other of these statutory

words are, either mingled with other words or not as the case requires, essential to a complete description of the offense; or if the pleader chooses words which are either equivalent in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise' would be sufficient.

Idem, sec. 612, sub-secs. 2 and 3 and authorities cited thereunder.

We can therefore see no reason why the indictment in this case does not fully comply with all the requirements of the law as it certainly embraces all elements of the offense charged and is charged in the exact words of the statute or words of equivalent meaning.

FIRST GROUND OF DEMURRER.

The first ground of demurrer "is that more than one crime is charged."

MORE THAN ONE CRIME CHARGED.

An Act of the Legislature of the Territory of Alaska, approved April 26, 1913, entitled "An Act to amend section 43 of Title 2 of the Act of Congress approved March 3, 1899, entitled, An Act to define and punish crimes in the District of Alaska, and to provide a Code of Criminal Procedure for said District," provides as follows:

"When there are several charges against

any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

(Session Laws, Alaska, 1913, p. 65.)

Under this statute two or more acts or transactions connected together or two or more acts or transactions of the same class of crimes or offenses may properly be joined in one indictment having separate counts.

This is a wise statute and intended to prevent multiplicity of trials. Complaint in error has stated no reason why this statute is not valid and can state none.

SECOND GROUND OF DEMURRER.

The second ground of demurrer "that said indictment does not state facts sufficient to constitute *any crime*," is certainly inconsistent with the first ground which charges that it embraces *more than one crime*.

But we have shown that the indictment *may charge more than one crime*.

The indictment charges that said defendant

did unlawfully maintain and operate for fishing during the close season and at the times and places mentioned, "without having the tunnel of such trap closed and without having twenty-five feet of the webbing or net of the heart of such trap on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes."

This is charging the offense in *haec verba* of the statute except the statute says: "It shall be unlawful to fish for" etc. while the indictment describes the offense by charging "did unlawfully maintain and operate for fishing, etc."

Now it is clear that *to maintain and operate a fish trap for fishing* is simply another way of saying did fish by means of a fish trap. To "*operate for fishing is to fish.*" Now if defendant did fish by means of a fish trap in the manner and under the circumstances set out in the indictment then surely the law would be violated.

Tested by all the rules of the text writers it would seem that this indictment is sufficient.

All the ingredients of the crime can be accurately and clearly perceived in these counts. See

United States vs. Cook, 17 Wall 168

United States vs. Carll, 102 U. S. 612

It is sufficient if it is in the substantive words of the statute, without any expansion.

United States vs. Simons, 96, U. S. 360.

THIRD GROUND OF DEMURRER

It will be noticed that the third ground of demurrer to the indictment charges:

(a.) that the facts stated in Count One do not constitute a crime against the defendant company, and then undertakes to set out the language of Count One. This is no more than a repetition of ground two but is simply adding to the charge that no crime has been charged, a further statement of the very thing which was contemplated and aimed at in the second ground of demurrer and does not make the demurrer any stronger or add any force whatever to it. Therefore, if the second ground of demurrer was not well taken, this part of the third ground of demurrer could not be valid.

(b.) The third ground of demurrer also embraces a charge that said Count One is duplicitous and ambiguous and attempts to charge two crimes and does not substantially conform with the requirements of Chapter 7 of the Compiled Laws of the Territory of Alaska, being sub-division 2 of section 2147 of the Compiled Laws of the Territory of Alaska. And that said count is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime, if any, is attempted or intended to be charged.

We admit our inability to fully characterize this assignment of demurrer. It is "broad and

general as the casing air." It is like a great mist. It reaches out and covers up all that has preceded it and all that is to follow after. It is like a great German gas bomb. It envelopes the entire army, but unlike it, it has no poisonous quality. It struggles to assign at least one reason why the indictment is bad, and in so doing attempts to assign many and hints at others, but really assigns no valid one. It says the indictment is duplicitious. It says it is ambiguous. It says it attempts to charge two crimes. It says it does not conform to sub-sec. 2 of Sec. 2147 of the Compiled Laws of Alaska. It says that it is not stated in such a manner as to enable a person of common understanding to know what is intended thereby, or what crime is charged, but it gives no reasons for any of these allegations. It is a re-hash of all that has been said before, and it is more.

A demurrer should be an orderly and succinct statement of reasons why a certain pleading is insufficient. It should state those reasons as separately one at a time by numbers and each reason should be clear legal reason for the charge it makes.

AS TO THE SUFFICIENCY OF THE DEMUR- RERS.

It is not sufficient in a special demurrer to assign as special cause in general that the pleading is double or lacks form. It must show in what the

duplicity consists, or wherein the form is deficient.

94 Ill. 440, *Holmes vs C. & A. R. R. Co.*

A demurrer which states the ground of demurrer to be "That the plea is double and alleges two grounds of defense" is not a sufficient specification of duplicity and can not be considered. It should state in what the duplicity consists.

Kipp vs. Bell, 86 Ill. 577.

Chitty, in his work on Pleading, vol. 1, p. 706, says that it is not sufficient in specifying grounds of demurrer to say the pleading is double or wants form but it should show in what the duplicity consists. That causes of demurrer shall be specially assigned and not involved in general unapplied expressions of "double," "negative pregnant," "uncertain," "want of form" and the like but shall show "wherein," in order that the other party may either join in the demurrer or discontinue, etc.

Therefore the demurrer should state wherein more than one crime is charged, or wherein it is ambiguous, or wherein the duplicity consists, or wherein it fails to comply with sub-sec. 2 of Section 2147. Tested by these rules this demurrer must fail for it does not say wherein the indictment is either duplicitous or ambiguous or wherein it attempts to charge two crimes or wherein it does not conform to sub-sec. 2 of Sec. 2147, C. L. A. or why a man of common understanding could not

know what is intended thereby or what crime, if any, is intended to be charged. We insist that the indictment is in absolute conformity with sub-sec. 2 of Sec. 2147 C. L. A.

For all the reasons stated above we therefore insist that all the demurrers filed in the three cases are invalid, and were properly over-ruled.

FAILURE TO SUSTAIN ATTACK ON INDICTMENTS.

Learned counsel for plaintiff in error have wisely refrained from attempting to support their various demurrers by argument, except in a very limited and partial manner.

They have simply been content to *demur*, but have made no effort to elucidate their positions by a discussion of the questions involved. They have cited no authority to aid the Court in reaching its conclusions.

At the inception of this legal battle, like brave soldiers they rushed to the front and planted these many demurrers like so many Howitzers threatening death and havoc in every direction, but in the roar of battle and din of carnage they have forgotten to fire the fuse, and in the hour of defeat they have dragged them off the field in all their ponderous bulk and safely stored them away in the transcript where they now lie in innocuous desuetude as silent and pathetic relics of cherished

memories, but whose usefulness has long since ceased. *Pax vobiscum.*

ORDERS OVERRULING DEMURRER.

Order overruling demurrer and entering plea of "Not Guilty" to indictments No. 1034-B, 1035-B, 1036-B.

Tr. pp. 31, 35, 44.

CONSOLIDATED BY CONSENT.

Order entered October 27, 1914, calling for an open venire and "by *consent the three indictments*, Nos. 1034-B, 1035-B, 1036-B, were *consolidated* for the purpose of trial."

Tr. p. 151.

OBJECTIONS TO TRIAL.

There appears in the Transcript, pp. 152-154, a paper denominated "Objections" signed by attorneys for the defendant, the plaintiff in error. This paper bears no date or file mark and does not appear ever to have been regularly filed in the cause. It is in the main a restatement of the several grounds of demurrer which had heretofore been aimed at the indictment and had been overruled. These objections were overruled by the Court.

Tr. p. 154.

This manner of pleading is unknown to the forms of practice and was properly disregarded by

the Court. Even if the objections were considered and passed upon, still it is very evident that they are nothing more than alleged reasons which had been specifically overruled in passing upon the various demurrers above set out.

It is stated in the caption of these "Objections" that they were offered after the empaneling of the Jury and after the first witness on behalf of the plaintiff had been sworn. These Objections are repeated and set out in the Transcript a number of times with great prolixity and redundancy for what good purpose it would be difficult to say.

Tr. pp. 59-64, 79-90, 100-114, 152-154.

The practice of attacking the sufficiency of indictments by the objection to the introduction of evidence thereunder is not recognized in the Federal courts.

Miller vs. U. S. 161 Fed. 672.

TRIAL ORDERED TO PROCEED.

Upon the overruling of said "Objections" the trial proceeded by the examination of witnesses in behalf of the Government.

Tr. p. 154.

PLAINTIFF'S WITNESSES AND SUBSTANCE
OF THEIR TESTIMONY.

On the trial of the cause plaintiff introduced the following witnesses:

J. W. Bell

Tr. pp. 267-269.

Jesse L. Neville

Tr. pp 220-239.

Ernest P. Walker

Tr. pp. 151-220.

Harry Ward

Tr. pp. 239-267.

J. W. Bell was examined for the purpose of producing the articles of incorporation of the Thlinket Packing Company, upon the presentation of which it was agreed that, without burdening the record, the defendant admitted that said company is incorporated.

Tr. p. 267.

Said witness also produced in evidence a calendar for the year 1914, showing that the 8th of August, 1914, was Saturday, Sunday was the 9th, etc.; and that the 11th of July, 1914, was Saturday, and that the 12th of said month was Sunday.

Tr. pp. 268, 269.

Jesse L. Neville testified, in substance, that he was master on the Santa Rita, a boat chartered for the U. S. Fish Bureau Commission, that between the hours of six o'clock Saturday, July 11, 1914,

and Monday morning, July 13, 1914, at six o'clock he made a trip to the fish traps belonging to the defendant company, that he visited traps Nos. 1, 2, 3, 4, 5 and 6.

Tr. pp. 222-226.

His testimony shows that the tunnel of said traps leading into the pot of the trap was open during this time, i. e., on Sunday, and further that twenty-five feet of the webbing or net of the heart of the trap on each side of the pot was only open about the space of one or two feet.

Tr. p. 227.

He shows that on August 9th, which was Sunday, he visited trap No. 11 and that said webbing was not lifted or lowered for twenty-five feet but approximately ten or eleven feet, the opening being at the top of the webbing, and the opening at the water's level did not exceed six or seven feet. The same in regard to traps Nos. 1, 2, 3, 3A on said date.

Tr. pp. 228-230.

ERNEST P. WALKER'S TESTIMONY.

Mr. Walker testified that he was warden of the United States Bureau of Fisheries, Alaska Service, and that he knew the defendant's traps Nos. 1, 2, 3, 3A, 4, 5, 6, 9, 11 and 12. He presented a model of the fish traps.

Tr. pp. 154, 155.

That he made a patrol of traps Nos. 1, 2, 3, 4, 5 and

6 during the weekly close season beginning at six o'clock post meridian Saturday, July 11, 1914, and ending at six o'clock ante meridian Monday, July 13, 1914.

Tr. p. 158.

That twenty-five feet of the webbing of trap No. 1 on each side of the pot next to the heart was not open twenty-five feet.

Tr. p. 159.

Exhibits to the jury the model trap and points out the heart walls.

Tr. p. 160.

Testifies that twenty-five feet of the webbing of the heart of trap No. 2 was not lifted or lowered in the manner required by law and that it was not open twenty-five feet back from the pot. He testified the same as to trap No. 3, and also as regards No. 4.

Tr. pp. 160, 161.

He testifies the same as to trap No. 5, and further that the tunnel to the trap was not completely closed. As to trap No. 6 he testifies the same as to Nos. 4 and 5.

Tr. pp. 162, 163.

He testified that the webbing of the heart walls on each of these traps was not open as required by law and that an attempt or pretense had been made of opening each one, and, referring to notes made at the time of inspection.

Tr. p. 163.

He states that trap No. 1 was visited at 9:45 A. M. the morning of the 12th and that the heart wall was open approximately four feet, that for the remaining distance, twenty-one feet, the webbing was in position for fishing.

Tr. p. 164.

That the heart walls of No. 2 at this time were opened back four feet at the water's level and that the balance of twenty-one feet was in perfect fishing condition.

Tr. p. 164.

As to trap No. 3, that the heart wall was open two feet and that balance of the netting was in its normal condition, that the remaining twenty-three feet was not lowered or raised.

Tr. p. 165.

As to trap No. 4 he could not state exactly but thought it was open less than twenty-five feet. As to trap No. 5, the opening in the heart walls did not exceed four feet. As to trap No. 6, he testified that the opening on one side was about one foot and the other about three feet and that the remaining part of the webbing of the heart was not raised or lowered or otherwise opened.

Tr. p. 166.

He further testified that during the close season beginning at six o'clock post meridian, August 8th, which was Saturday, and ending Monday morning, August 10, 1914, at six o'clock ante meridian

he visited traps Nos. 11 and 12, that the heart walls next to the pot of trap No. 11 were not raised or lowered for a distance of twenty-five feet and that he took a photograph of this trap on the Monday morning following.

Tr. pp 166, 167.

He testified that the tunnel had been drawn out into the pot and changed from what it was on Sunday but that the heart walls had not been changed. And said photograph was offered in evidence and marked "X."

Tr. pp. 168, 169.

He further testified that on the same trip, that this is August 8th, and during the close season, he visited trap No. 1 and that the webbing or net of the heart thereof was not opened or raised for twenty-five feet and that the tunnel of the trap was not opened at least one foot.

Tr. p. 170.

That he also visited trap No. 2 at the same time and that the webbing or net of the heart was not raised or lowered for twenty-five feet, and, in reply to a question as to the condition of the tunnel on that occasion the reply was, "It was open approximately 18 inches." As to trap No. 3 he stated that the webbing was not opened for twenty-five feet, either raised or lowered, and that the tunnel had a slight opening remaining in that. As to trap No. 4 on the same occasion, he testified that the webbing, etc., was not raised or lowered for twenty-

five feet and that the tunnel was “merely slacked away—that is not pulled to one side, not completely closed.”

Tr. pp. 171, 172.

As to trap No. 3-A, the heart walls were not raised or lowered or otherwise opened for twenty-five feet next to the pot. The tunnel was open about a foot.

As to trap No. 6 on said occasion, the webbing, etc., was not raised or lowered or otherwise opened for a distance of twenty-five feet next to the pot, and the tunnel was opened only 18 inches to 2 feet.

Testified further that as to trap No. 1 the webbing, etc., next to the pot was not opened a distance of twenty-five feet, neither raised nor lowered nor otherwise opened, and that “so far as could be seen was open below the water level, that is pulled into the pot.”

Tr. pp. 172, 173.

He further testified, in answer to a question, how wide was the entrance to the heart of the trap where the lead intersects the heart, as follows. “On each side of the lead it would be approximately 10 feet, may be a little over, may be a little less.

Tr. p. 197.

He testified that the size of the pots of these traps enumerated in the indictment are approximately 40 x 40 feet.

Tr. p. 198

He testified that the traps were situated in the First Division of Alaska and in the waters of Icy Straits and Chatham Straits in that District.

Tr. p. 199.

He testified that the defendant company's traps were all marked T. P. Co., followed by numbers 1, 2, 3, 4, etc., and that he had not testified concerning any traps that did not belong to the defendant company.

Tr. p. 200.

And that said traps are net traps or fish traps and are stationary.

Tr. p. 201.

He testified that the length of the piles of these traps was approximately 70 ft.

Tr. p. 202.

He further testified that the short shove-down is attached to the long shove-down approximately about 30 feet, in one instance 24 feet.

Tr. p. 202.

He testified that the exhibit, model of trap, was substantially a copy of the traps mentioned in the indictment.

Tr. p. 203.

He explains the model.

Tr. p. 205, 206, 207.

HARRY WARD'S TESTIMONY

Mr. Ward testified that he was with the U. S. Fish Commissioner on the trip made July 11, 1914.

Tr. p. 239.

That on July 12th, in the forenoon about 9 o'clock, they reached trap No. 1. He testified that they reached trap No. 2 on the same occasion, that they started at trap No. 6 and went up to 1 on those particular traps; that he observed trap No. 3; didn't see No. 2; that this was on Sunday.

Tr. p. 242.

That he noticed the short shove-down, the top of which was around the first pile just back to the first pile about 12 feet, and that the 25 feet was not raised or lowered.

Tr. p. 243.

That he noticed trap No. 4, and that the shove down was back on a slant about 12 feet.

Tr. p. 243.

That he noticed trap No. 5, that the webbing, etc. was not raised or lowered 25 feet, was about like the others, about 12 feet.

Tr. p. 244.

That he visited trap No. 6 but didn't examine it.

Tr. p. 245.

He states that on August 8th about 9 o'clock in the evening he visited traps Nos. 11 and 12 and that the webbing, etc., was not lifted or lowered 25 feet.

Tr. p. 245, 246.

That the shove-down was back about 10 or 12 feet at the top.

Tr. p. 246, 247.

That on August 9th he visited traps Nos. 11 and 12.

Tr. p. 247.

That on the same date he visited trap No. 1 and that the webbing, etc. was not back for 25 feet but only 10 or 12 feet, that the short shove-down was back a distance of 10 or 12 feet on a slant lashed to the middle of the shove-down; and that the shove-down in each of these cases was fastened.

Tr. p. 248.

He testified that the shove-down would extend downward from the top of the capping for about 25 feet.

Tr. pp. 250, 251.

And that this was the condition in each of the traps; that on August 9th the webbing, etc., on trap No. 1 was not lowered or raised 25 feet; and that trap No. 2 was in the same condition. That trap No. 3 he does not think was closed, the webbing, etc., was not lowered or lifted 25 feet, and he describes the shove-down as he did in the other cases. That he thinks he noticed trap No. 3-A because it had a wire tunnel. He said: "And I don't think it was absolutely closed," and that the webbing, etc., was not lifted or lowered 25 feet.

Tr. pp. 253, 254.

That he visited on that occasion trap No. 4, that it was not closed at all, that the webbing, etc., was not lifted or lowered 25 feet; that he also visited trap No. 6 on that occasion and that the tunnel was open about 2 feet.

Tr. pp 254, 255.

And the webbing, etc., was not lifted or lowered 25 feet. He explained by saying that the opening was not 25 feet from the heart on the part next to the walls and that there was a space next to the pot in the heart where it wasn't so opened.

Tr. p. 255.

That he visited trap No. 9 at the same time but does not recall the examination of it.

Tr. p. 255.

TESTIMONY OF PLAINTIFF IN ERROR

The testimony offered by the plaintiff in error in no way tends to disprove the essential facts proven by the testimony for the defendant in error. Plaintiff in error contented itself with a general description of fish traps and the manner of the operation of the same and as to the habits of fishes, etc., but did not attempt to deny the facts which sustain the indictment in these causes, and hence they need no discussion. This appears from a reading of the evidence introduced by plaintiff in error and it would not be necessary here to quote any of said evidence because it would simply necessitate a repetition of the entire evidence and of course that

would hardly be proper under the circumstances.

Therefore, the facts charged in the indictment stand approved.

It is true that it is insisted that under the proof there is shown a partial compliance with the law, viz. by *partly* closing the tunnel and opening a *small* distance in the webbing or net of the heart. But as this will be fully noted in the discussion of the charge of the Court it need not here be further noted.

ARGUMENT ON FACTS OF THE CASE

It will be especially noted that the plaintiff in error introduced no evidence to contradict the facts proven, a resume of which has been given in the former part of this brief. The only effort made by plaintiff in error seems to have been done with the intention of involving the Court in some error of law and may well be discussed in the discussion of the assignments of error.

But in order that our contentions may be fully understood by the Court we will discuss the facts of the case without unnecessary detail.

DESCRIPTION OF FISH TRAPS

The traps mentioned in these indictments and maintained by the plaintiff in error are trap nets and are described in the evidence as follows:

They consist of a lead, a heart, two tunnels, a pot, a spiller (tr. 156-7), and sometimes an addi-

tional contrivance is provided, called a "jigger" (tr. 285.) They are constructed by driving piles, placed about 10 feet apart, (tr. 188) into the bed of the sea from the shore outward and attaching webbing (either cotton webbing or wire netting) to the piles (tr. 206). The lead consists of a row of piles driven as above from the shore out to deep water where the trap is to be located, a distance varying according to the location of from 100 feet to one mile (tr. 205). The webbing or netting on the lead and on the heart extends the whole length of the lead (tr. 205) and around the heart walls, except where the lead enters the heart, and down to the bottom of the sea (tr. 208). The webbing or netting on the pot and spiller extends down a distance of 40 feet (tr. 209). The lead consists of a single row of piles, as above stated, with the webbing attached thereto. The heart is so called because of its shape; the base of the heart faces the shore and the lead enters into and through the base of the heart, leaving an opening in the heart sometimes on each side of the lead and sometimes leaving an opening on one side only of the lead, the opening varying in width from ten to fifteen feet (tr. 197, 198, 211). The piling of the heart, the pot and the spiller is generally capped (tr. 201), upon which a person may walk all around those portions of the trap (tr. 237-238). The apex of the heart joins to the pot. The piling at the apex of the heart

at its junction with the pot, is about 70 feet deep (tr. 202) and the distance between that piling and the pile next from the pot shoreward in the heart wall is approximately 10 feet. (tr. 188, 191). Constructed inside of the pot, which is about 40 ft. square, and leading from the heart into the pot, is a tunnel made of webbing, which has an opening of about 10 ft. at the heart end of the tunnel and from 6 inches to a foot wide at the inner end of the tunnel within the pot (tr. 279), somewhat similar in design to that of an old fashioned rat trap (tr. 206); and there is another tunnel of webbing similar in design in the spiller and of about the same dimensions, leading from the pot into the spiller (tr. 207). At the junction of the heart and the pot there is a long pile or pole to which the webbing which surrounds the heart is attached, by means of which pole the webbing is shoved down to the bottom of the sea at that point, hence it is called a "shove-down." Attached to this shove-down is a shorter pole or pile, about 24 ft. long; this is known as the "short shove-down" and is fastened to the long shove-down at a point about 24 ft. below the capping (tr. 182, 202), to which short shove-down the webbing is attached from its lower end to its top. This "short shove-down" counsel has renamed in these cases as the "pull back" or "closing stick." (tr. 183).

Some traps have a device which is called a

“jigger”, which is a row of piles driven at an angle to the base of the heart, on each side when there are two entrances to the heart, otherwise on the side with the opening or entrance, with a hook (that is, piles driven in the form of a semi-circle or hook) at the end farthest from the heart, on which webbing is also stretched for the purpose of intercepting any fish which may back-track through the entrance into the heart, or fail to enter the heart; they will strike this jigger which will cause them to turn into or back into the heart (tr. 285). This device is a stationary trap net or fish trap (tr. 201); is a pretty effective means of catching fish (tr. 280); there is no other device known which is more effective (tr. 289). This description may be aided by reference to the photographic illustration shown on page 47 herein taken from the report of Dr. E. Lester Jones, Dep. Com. Fisheries.

OPERATION OF TRAPS

As the fish are on their way to the spawning grounds (tr. 276), (which are up the streams that empty into the sea), they travel along shore and encounter the lead of the trap, which they follow until finally they work themselves into the heart (tr. 276). They will work around the heart against the web to the entrance of the tunnel, which is constructed to lead them into the pot, (tr. 294), into which they work (tr. 278, 284), and finally work

through the tunnel from the pot into the spiller. These tunnels both in the pot and in the spiller are generally made "V" shape with a narrow opening at the inner end, so as to prevent the fish from returning through the tunnel into the pot or heart (tr. 279), and, as stated above, from the spiller, which like the pot is practically a large basket made of webbing, 40 ft. square, 40 ft. deep, with a web bottom, suspended within the piling, they are brailed into the boats or scows and transferred to the cannery.

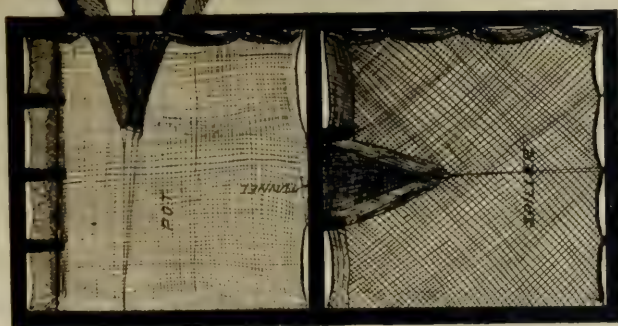
Thus when a trap is once constructed and in repair *it automatically begins to fish and continues to catch fish, night and day, and every day, and every night, and every hour, as long as the fish run, or throughout the fishing season (which season commences about July (tr. 181) and ends about October, about three months), unless put out of fishing form as required by the statute. And, of course, the owner of such trap is fishing while the trap is in operation.*

The law requires that during the thirty-six hours close season prescribed therein *the tunnels of such traps shall be closed and that 25 feet of the heart webbing on each side of the heart next to the pot shall be lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.*

Thirty-six hours a week is approximately one-fifth of a week—or 20 per cent. of the time, there-



SKETCH OF
ALASKA FISH TRAP
BUREAU OF FISHERIES
1914



Sketch of Alaska fish trap.

fore the law requires the traps to be out of commission; this in order to prevent the total annihilation of the fish. The last report of the Governor of Alaska (1915) shows that the value of the annual fish pack of this Territory is over \$21,000,000; this catch and pack is accomplished within the space of three months, and one-fifth or 20 per cent. of this pack means to the packers over \$4,000,000; that is what cessation of fishing during the close season means to the packers. Perhaps this is incentive enough to the plaintiff in error to father the wish that these provisions be so construed as to permit them to catch fish during the close season and still pretend to comply with the law.

The act providing among other things, for a close season each week of thirty-six hours, also provides in what condition the traps shall be maintained during the close season—it provides that they shall be adjusted in the manner stated—this to make effective the close season. It says that the *tunnels shall be closed* and that at the same time *25 feet of the heart webbing shall be raised or lowered* in a particular way for a particular purpose.

This provision for the maintenance of the traps is one of the provisions of the Act, the violation of which renders a person liable to punishment; it is not complied with by simply closing the tunnels, nor is it complied with by *opening the heart webbing*; the law says that *both* must be done. The law

is violated if *neither* is done, and the law is violated if *only one* of them is done, and, therefore, the counts in this indictment on that head are not open to attack. "The evident purpose of that section" is exactly what it says, i. e., to keep the traps in the condition commanded by the Act during the close season—*when kept in this condition they cannot fish; when kept otherwise they do fish.*

But what was plainiff in error's pretended compliance with the law? It did not lift the webbing, nor did it lower it, nor did it pretend to. It merely interjected a new word into the statute, "pull back." Attaching the heart webbing to the short shove-down, about 24 feet long, vertically, it pulled the top of this shove-down back four to ten feet, sometimes, as far back as the first pile is, a distance of ten or twelve feet, displacing so much of the webbing as was attached to the shove-down, a little sliver of webbing from four to ten feet wide at the top and angling to nothing at the bottom, twenty-four feet below the capping. None of this webbing was lifted or lowered, four to ten feet of it was pulled back at the top, and twenty-four feet below nothing was pulled back and none of the webbing was disturbed for the rest of the distance down to the bottom of the sea, there was no disturbance of the webbing whatever, a distance of some thirty to thirty-five feet (tr. 312), so that *there was no opening at all at low tide* (tr 249) or a little below.

WHAT "PASSAGE" DID THE FISH HAVE
WITH THIS OPERATION?

"Whatever fish were in the heart below the low tide line would remain there until the tide started to raise" (tr. 309)—(testimony produced by plaintiff in error.)

No free or other passage there at all.

"For few fish get out of the heart unless they jump out" (tr. 302)—and so on all through the record introduced by plaintiff in error itself.

The bottom of the shove-downs were only to low tide (tr. 251) so fish below that had no passage at all, and this during the close season (tr. 252).

A glance at Exhibit A, page 349 of the transcript, will show the Court the manner in which plaintiff in error pretended to comply with this law. The Court will notice the distance between the piles, will notice that in the photograph there is a very small space left open at the water line and that this space was reduced to nothing at low tide, that a space of webbing twenty-five feet in width would be a space that would extend between two sections of piling, or from one pile to the second pile beyond.

The Court will also notice the condition of the webbing; as testified to by plaintiff in error, it becomes filled with dirt, seaweed, etc., and makes

above and below the water a dark wall which, it is testified by plaintiff in error, the fish are afraid of (see tr. 308); that they seek light, and the Court can see with this webbing substantially in place, as it is shown in the photograph, the dark wall of the webbing offers them no light at this point, no notice of an open way, no attraction to a passage way, no *free* passage unless they happen to be actually on the very surface itself; no opening below the low tide; and it is admitted in the record of course that they swim underneath, "below the water line," (tr. 302) and that some fish prefer the deeper waters.

Plaintiff in error, no doubt with intent to shift whatever culpability there may be in this case from its shoulders to the fish, devoted the greater part of what testimony it offered to describing the mental and physical characteristics of the fish with which it clashes; and their habits, and demeanor. For instance, we find the following expressions offered in the evidence of plaintiff in error:

They acted like "other caged animals" (tr. 274) when caught. They are "wary animals" (tr. 277).

When they get in the trap they go right up to the webbing, approach it readily (tr. 277).

They become wary and cautious when they enter the trap (tr. 277)

They first go into the heart (tr. 277).

They "steady around a while" (tr. 278), and then "they are just as liable to go outside as they are inside" (tr. 277).

After they "steady down" in the heart a while then they move about the trap" (tr. 278).

Their habits "are like some other wild animals" (tr. 279).

By their weight they'd tear down a web and get out (tr. 290).

They don't go into the hearts on Sunday, "they go out the opening prescribed by law" (tr. 301).

Keegan (plaintiff in error's witness) saw them back up a ways then make a run and jump over the webbing (tr. 291).

But it is settled that more fish do not get out of the traps than get into them (tr. 290).

The "dog" salmon will not trap without a leader (tr. 279).

But the "king" seeks royal solitude, "he traps by himself" (tr. 279).

And he is a pretty canny animal too (tr. 280).

They climb precipitous places (tr. 292), climb over the falls in large rivers—jump over them (tr. 292).

They are wary and game (tr. 295).

But the testimony that seems to destroy the effect of all the foregoing is that of the witnesses Nelson for plaintiff in error. He says: "They do not go into the hearts in the close season; they go

out the opening prescribed by law" (tr. 301), which is wholly imaginary at low tide.

And "they would not go through the tunnels on Sunday—they would look around for the twenty-five foot opening first" (tr. 303), (*and fail to find it.*)

Plaintiff in error's witness Keegan says the heart is constructed to keep the fish in it until they gradually work their way into the pot (tr. 293).

But never he saw any fish climb up the webbing and crawl over it (tr. 294).

So that it appeared at certain stages of the testimony as though the fish were arrant rogues and law-breakers, gifted with great cunning and cautiousness, indeed, that they are superfish—not fish, but "animals"; at other times that they were savages, giving way to anger, possessed of cruelty and lacking in cultivation of mind or manners; at other times that they, the "dogs" as well as the "kings", were of a military spirit, and made great drives on the webbing of the traps like the Kaiser's army; then again that they were careless oafs disporting, playing, leaping, laughing around the traps, climbing up and over them and through the webs, jumping over barriers, and even at other times leaping over great waterfalls up mighty rivers—sort of bohemians and acrobats; and again that they knew and obeyed the law; but the mat-

ter of their total intellectual attainments was left a mooted question, as, out of deference to counsel's desire, the trial Court refrained from ascertaining whether or not the canneryman is smarter than a fish (tr. 300).

CONCLUSIONS ON THE FACTS.

The Court will easily see that the pretended compliance with the statute by leaving only a small opening in the webbing, is really no compliance at all, the mere fact that some fish may, a part of the time, be able to find exit from the trap through this small opening is no justification. If all fish were wise enough to find this opening then all fish would be wise enough to avoid the trap entirely. The law says that the tunnel *shall be closed* and the 25 feet of the webbing shall be either raised or lowered.

ARGUMENT IN REPLY TO ASSIGNMENT OF ERRORS.

The argument of plaintiff in error is divided into three main sections. The first relates to pleadings; the second to instructions of the Court to the jury; and the third to the verdict.

I.

Plaintiff in error makes fourteen assignments of errors numbered from 1 to 14 consecutively. We

will treat of these assignments of error in the order and under the headings as treated in the argument of plaintiff in error.

Specifications Nos. 1 and 2 refer to the demurrers to the several indictments, as to their sufficiency, etc.

The object of the Act, of course, under which the indictments are drawn is to protect and regulate the fisheries of Alaska—a right, of course, which Congress has under the police powers of the Government. Plaintiff in error does not claim that Congress does not have this right but it is conceded. It is charged that plaintiff in error maintained trap nets in the waters of Alaska, in Division Number One, and that during the weekly close season provided by the Act failed to close its tunnel or raise or lower 25 feet of the heart webbing, as commanded by the Act.

We maintain that it is not necessary to allege that it caught a single fish. The law places no such burden of proof upon the Government. It plainly commands that the traps during the close season shall be maintained as prescribed, under penalty of its violation.

But the counts go much further than that, and the evidence follows. They show in what particular waters of the First Division of Alaska the traps were located (tr. 199), and not only that, but that they were actually operating; the evidence verifies the statement made herein that when these

traps are erected and in repair they fish all the time during the whole season in which the fish run, as it shows that they were actually fishing (tr. 169). It is true, on the objection of plaintiff in error to the reception of evidence proving that the traps not only were maintained in violation of law but were actually fishing, the learned trial judge held that this proof was unnecessary, but the Government was able to prove it, and offered it and showed it.

The counts show that the traps were in Icy Straits and in Chatham Straits, in Division Number One, Alaska—therefore, they were not in Cook Inlet, or in the Delta of the Copper River, or in the Bering Sea (the excepted waters); and also showed the dates of the offense, to-wit, the hour prescribed as the close season, and the evidence proves these allegations. None of this evidence was contraverated by plaintiff in error, which contented itself in the presentation of its evidence with attempting merely to prove that it caught only a highly intellectual grade of fish,—thus palliating its offense. The evidence covered all the elements of the offense and was sufficient. It showed that 25 feet of the webbing at the places in the trap called for by the Act was not lifted or lowered; *if it was not lifted or lowered*, it was not lifted or lowered in such a manner as to permit the free passage of salmon and other fishes, or in any other manner.

The arguments heretofore set out in a former part of this brief (on pages from 16 to 27) in regard to the sufficiency of the indictments, we think entirely dispose of the questions raised in specifications of errors Nos. 1 and 2, and therefore need no further discussion.

It will be noted that plaintiff in error's third assignment of error is an allegation that the Court erred in permitting the plaintiff to prove where the fish traps mentioned in the indictments are located. It will be further noted that after assigning this error, plaintiff in error thereafter omits all reference to it and makes no argument to the Court and assigns no reasons why the Court erred in admitting this proof. As a matter of fact, there was no error in its admission and the case would not have been complete had not the venue been proven. No further argument seems necessary on this point.

IN REPLY TO MOTION FOR NON-SUIT OR INSTRUCTED VERDICT.

Plaintiff in error's 4th assignment of error is based upon the proposition that the Court erred in overruling and denying defendant's "motion for non-suit or a directed verdict", which motion is set out on pages 15 to 18 of brief of plaintiff in error.

It seems unnecessary to discuss this motion, for,

as stated, in place thereof it is the same objections as raised by the demurrer to the indictment which have been fully discussed in another part of this brief and need not be further mentioned.

As to the allegation there was an insufficiency of the evidence to sustain the verdict, we would simply say that the discussion of this branch of said motion is fully embraced in our argument upon the facts of the case and we think is conclusive.

Defendant in error's statement of the charge and the facts relating thereto as set out on pages 43, 44 and 45, are incorrect. On page 43 defendant says that the case was tried on the theory that it was only necessary to prove two things:

First, the failure of the defendant during the weekly close season to have 25 feet of the webbing of the heart next to the pot lifted or lowered *vertically in rectangular shape*, or

Second, the failure of the defendant during the weekly close season to have the tunnel of said trap closed, or failure of the defendant to comply with both of the last mentioned conditions.

It will be noted that the first statement is in no wise sustained by the charge in the indictment nor by the proof in the case. There was no effort on the part of the plaintiff to show that the 25 feet of the webbing of the heart next to the pot should be lifted or lowered *vertically in a rectangular shape*. The evidence was directed to the failure of the plaintiff in error to either lift or

lower said webbing as required by the statute *in such a manner as to permit the free passage of salmon and other fishes*. This is purely a question of fact for the jury. The charge in the indictment was fully sustained by the proven facts, which were not denied by the plaintiff in error, and hence there can be no validity in this method of attack as a matter of fact.

As to the second statement on page 43, in regard to the closing of the tunnel of said trap and the failure to comply with both of said last conditions, it fully appears from the proof that neither of these requirements was performed by the plaintiff in error. So that both of these objections as to facts are invalid as the proof fully sustains the charges on these points as set out in the indictment.

LAW AS APPLICABLE TO SAID MOTION FOR AN INSTRUCTED VERDICT.

Such a motion will only be entertained in case of failure of proof after the evidence in behalf of the plaintiff is all in. The circumstance in which a non-suit should be refused have been variously stated, as follows:

- (1) when plaintiff makes out a prima facie case.

38 Cyc. p. 1557.

Non-Refillable Bottle Co. v. Robinson 8
Cal. App. 103.

96 Pac. 324.

(2) when on the evidence adduced plaintiff is entitled to have his case, as made by the pleadings, submitted to the jury.

Idem.

* * *

(3) when there is some substantial evidence in support of the plaintiff's case.

Idem, 1558.

Lally v. Prud. Ins. Co. 75 N. H. 188, 72
Atl. 208.

(4) where the evidence and presumption arising therefrom are legally sufficient to prove the material allegations of the complaint.

Idem and cases cited in the note.

(5) where evidence authorizes a finding for either party or where the jury is authorized to put a construction upon the evidence or by any inference they may draw from it, the plaintiff is entitled to recover, or where the evidence in any reasonable view giving the plaintiff the benefit of the most reasonable inference, will support a verdict in his favor.

Indem 1559 and cases there cited.

The 2nd ground of said motion charges that there was no evidence to establish the facts charged in the indictments, and further that the indictments do not allege that the defendant failed to close the gate, or mouth, or tunnel, or to raise the webbing, etc. As to the last part of the charge, it is evidently contradicted by the face of the indictments

themselves, and there could be no good reason why the Court should have sustained the motion for this alleged reason. As to the allegation that there was no evidence to sustain the facts in the case, it is easily to be seen that the record absolutely contradicts the theory therein advanced as the facts abundantly sustain the indictments.

The 3rd reason upon which said motion was based is an allegation that the indictments do not state facts constituting the alleged offense in such a manner as to apprise the defendant of the nature of the charge. Clearly there is nothing in this assignment when the indictments are considered, for the indictments specifically allege wherein and in what manner the law had been violated.

The 4th reason is based upon the allegation that the indictments fail to allege that the fishing was done during the close season. Evidently this is an error, as the indictments are specific as to the time charged.

The 5th ground of said motion is based upon the alleged omission in the indictments to set out any particulars or facts as to the closing of the tunnel and raising or lowering of the webbing in such a manner as to prevent free passage of salmon, etc. This, like the other reasons, is not sustained by the record, for the indictments are specific in this regard.

The 6th reason for said motion alleges that the indictments failed to allege that the locality where

the fishing was done was not in the district or place excepted from the statute and was not with one of the excepted forms of gear, etc., and further that there was not before the jury any evidence to show whether or not any crime had been committed and that it was committed within the prohibited districts of the waters of Alaska. In reply to this reason for said motion we submit that it is not necessary that an indictment should state the places excepted by the statute, as they are not a part of the offense charged, and as all elements of the offense can be and were alleged in the indictments without any specification of said exception. So far as the exception in regard to the forms of gear, etc. used, the indictments show upon their face, by necessary inference, that all such exceptions were excluded from the charge and therefore it could have served no purpose to have set out any of the excepted modes.

Exceptions which are a part of the statute and which must be set out in the pleadings must be such matter as forms a substantive part of the charge or crime described in the indictment.

Where the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is *matter of defense*, and may be shown by the defense.

A negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment or information, unless the matter of such exception or proviso enters into or becomes a part of the description, or a qualification of the language defining or creating it.

State vs. Gee Wo. N. W. (Neb). pp. 513-515.

As to the balance of said charge 6, there can be no doubt but that the proof was sufficient upon the question of whether or not the offense was committed within the prohibited districts of the waters of Alaska. The Court will take judicial knowledge of the boundaries of Division Number One, District of Alaska, which is the part of the District of Alaska lying east of 141st meridian of west longitude.

BOUNDARIES ETC., COURTS TAKE JUDICIAL NOTICE.

Courts take Judicial notice of established boundaries of the states and territories where they are sitting and will know that a certain tract or region is or is not included therein.

16 Cyc. p. 859 sub-sec. b.

Perry vs. State, 113 Ga. 938. Other cases there cited.

and also of the further fact that the excepted waters are not within said district. But further than this, the proof shows that the location of the fish traps, as a matter of fact, are not in the excepted

waters but are in the waters of Icy Straits and Chatham Straits, which are themselves within Division Number One.

The 7th reason for said motion repeats one of the grounds of demurrer, i. e., that the indictments do not charge an offense in such a manner as to enable a person of common understanding to know what is intended, and that the offenses are not alleged with such certainty as to enable the Court to pronounce judgment. These phases of the question have been fully argued in the argument on the demurrers in the former part of this record and need not be repeated.

The 8th ground raises the question as to the sufficiency of evidence to show whether the traps were open sufficiently to admit of the free passage of salmon and other fishes. This is purely a question of fact to be determined by the jury. However, this is not one of the charges in the indictment, i. e., the indictments did not charge that the traps were not so open as to prevent the free running of salmon and other fishes. The charge in the indictments is for maintaining the fish traps contrary to the statute as specified in the indictments, by not doing the things therein required to be done.

II.

EXCEPTIONS TO CHARGE OF COURT.

Under the second division of plaintiff in error's argument upon assignment of errors, assignment of errors Nos. 5, 6, 7, 8, 9 and 10 are treated. After the conclusion of the Court's charges to the jury, counsel for plaintiff in error took two exceptions to that charge, as follows:

"We ask an exception to the refusal of the Court to give instructions numbered one, two, three, four and five, as offered to the Court. We also wish an exception to your Honor's instruction and illustration that you made referring to the raising and lowering of the webbing of the heart, especially the comparison made in reference to the window, when you complete illustrate your definition of what you mention about raising and lowering the webbing of the heart on each side of the tunnel." (tr. 326).

These are the only exceptions taken to the instructions as given by the Court to the jury as provided by Sec. 164, Alaska Criminal Code (Sec. 2273 Compiled Laws of Alaska), or at all.

The five instructions offered by counsel are set forth in plaintiff in error's assignment of errors No. 5 on pages 65 to 68 of the transcript and again on pages 86 to 89 of the transcript, and the instruction given, which was excepted to, is set

out in plaintiff in error's assignment of error No. 6 on pages 68 to 69 of the transcript and again on pages 89 and 90 of the transcript. There is no such exception reserved by plaintiff in error as appears on page 48 of its brief, set out in its specification of error No. 10 or at all. So that counsel did not "particularly" or otherwise object or except to the Court's statement in regard to Bower or Cobb nor to any other part of the Court's instructions, except as above stated, and *it is too late to do so now.*

All of the requests of plaintiff in error, so far as they correctly state the law, are covered in the Court's instructions as given.

And the illustration complained of in the 6th assignment of error appears to be beyond any question of doubt lucid, succinct, plain and illuminating, and states the proposition correctly in its simplest terms. The law says *25 ft. of the webbing must be lifted or lowered.*

What is the meaning of "lifted?" Lifted means moved in a direction opposite that of gravitation, raised up. What is the meaning of the word "lowered?" Lowered means to let down, to let descend or fall by its own weight.

And counsel themselves say in their brief that this Act must be construed strictly. To lift or to lower does not mean to shove aside or to push or to drive forward or backward. It does not mean, to

use counsel's coined phrase, to "pull back." It needs no construction. It is plain; there is nothing technical about it; the language is simple.

The language is plain and unambiguous. There is no room for construction. It is a familiar rule that when the language is clear courts have no discretion but to adopt the meaning which it imports."

Phelps vs. Racey, 60 N. Y. 10.

"This statute" (says the Court in the case just cited) "imposed a penalty on any person who should have in his possession any dead game at a certain season. In an action for a penalty the defendant answered that some of the game was in his possession before the passage of the statute, when the killing was not prohibited, and that the remainder was received from another State, where the killing was lawful. HELD, that the Act was not unconstitutional as a regulation of commerce nor as a deprivation of property after due process of law" (syllabus).

And the Court used the language above quoted as to the meaning of the Act.

The law says it shall be lifted or lowered in such manner as to permit the free passage of *salmon and other fishes*. That means, of course, not salmon alone but *all fishes*; those not only which swim near the *surface of the water* but those which

swim lower down as well as those which hug the bottom of the sea. For instance, the halibut, which do not affect the surface but take to the lower levels. It means that all fish shall have an unobstructed right of way through these traps for thirty-six hours each week—a roadway 25 feet in width; not simply the fish that manage to get into the trap.

It does not say in such manner as to permit *free escape* of fish—it says *free passage*. So that those coming upon the traps may see from any distance an open roadway through these traps, not a little cranny that they may search for or stumble on by accident, but one which they may pick up from a distance and pass through; not only to escape the deadly traps themselves but from other enemies as well, it must be free, unobstructed—a clear track over and through which they have right of way. It means that these traps shall be absolutely put out of fishing condition during the whole of the close season, and that all fish swimming in the waters where these traps are located shall have free passage through them for all that time.

If the webbing is lifted it must be lifted above the high tide line; if lowered it must be lowered at least below low tide line, and sufficiently below low tide line to permit all fish to pass through it freely, without obstruction, even if necessary to drop the webbing to the bottom of the sea.

The illustration of the learned trial judge follows the language of the Act and also complies with counsel's contention of strict construction; it is clear, it is common sense, and it is convincing; and it is as follows:

"Now, the indictment in this case is drawn under a certain section of the statute. I will read you that section:

" 'Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lower in such manner as to permit the free passage of salmon and other fishes.'

Now, I will tell you, gentlemen, what I think that section means, and, first, I will say that I think it means just exactly what it says. I don't think there is a superfluous word in that section, nor a word that doesn't express its meaning. Now, let us see: 'Throughout the weekly close season herein prescribed'—The statute has just prescribed that from six o'clock Saturday afternoon to six o'clock Monday morning is the weekly close season. Now, it says: 'Throughout the weekly close season herein prescribed—(that is the time now)—the gate, mouth or tunnel'—some people call it a gate, some call it a mouth, some call it a

tunnel, so it says: 'The gate, mouth or tunnel of all stationary and floating traps'—some traps are stationary and some floating, evidently, but the section takes them both in—'of all stationary and floating traps shall be closed *and*—(it doesn't say *or*)—twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon or other fishes.' Now, let us see—it wouldn't do to say that some of the net or webbing shall be lowered, unless the statute says how much shall be lowered so the statute says twenty-five feet of the webbing or net shall be lowered or raised. If the statute stopped there, it would not be definite, because it wouldn't say what part of the webbing of the heart of the fish-trap, so it is going to be definite about that, so it says; 'twenty-five feet of the webbing or net of the heart of such trap.' That wouldn't be definite if it stopped there, because the heart of a trap has two sides, so it says, in order to make that definite: 'Twenty-five feet of the webbing or net of the heart of the trap on each side'—each side means both sides, consequently—'twenty-five feet of the webbing or net of the heart on both sides'—that wouldn't be definite if it stopped there, because the heart extends over

some little distance—‘ what part of the heart?’—Then it says: ‘The heart next to the pot.’ What is to be done with it, this twenty-five feet of the webbing of the heart next to the pot on both sides of the heart—what is to be done with it? It shall be “lifted or lowered.” Now, there is the conjunction ‘or’—either one, either lifted or lowered. Is that the end of the section? No. It not only says twenty-five feet of the webbing of the heart next to the pot on each side be lifted or lowered, but that twenty-five feet must be lifted or lowered in a certain way or to accomplish a certain end and so it says that it must be lifted or lowered in such manner as to permit the free passage of salmon and other fishes.

“Now, that is a positive command, gentlemen, that twenty-five feet of the net of the heart next to the pot shall be either lifted or lowered, twenty-five feet of it, and it is not only a command that twenty-five feet of it be lifted or lowered, but it is also a command that the twenty-five feet be lifted or lowered in a certain particular manner and to accomplish a certain particular end. Now, take that window-pane just over you—you see a string hanging down that seems to divide the window-pane in two parts. Suppose that window-pane were actually in two separate parts, so that

each part could be lowered or raised and each part was twenty-five inches wide, and I asked you to please lower or raise twenty-five inches of that window next to this wall. (Indicating.) I cannot see how it means anything but that I am asking you to either raise or lower that part of the window. I am not asking you to shove the window back—I am not asking you to move the window this way or that—I am asking you to raise or lower it. Now, twenty-five feet of the webbing of the heart next to the pot can be raised or lowered, but it need not be horizontal all the way from one end to the other, but there must be twenty-five feet of it in the clear, raised or lowered in such a way as to permit the free passage of fish—salmon and other fishes—for the whole distance of the twenty-five feet.”

Where the instructions given by the Court in a criminal case cover all points set forth in defendants request and correctly state the law on all points upon which the Court was required to charge under the issues, the refusal of the instructions requested are no error.

Stockslager vs U. S. 116 Fed 590-599.

Referring again to the matter on page 49 of plaintiff in error's brief, in regard to Cobb and Bowers, counsel certainly are optimists—if they found a buttonhole they would imagine they had

found a suit of clothes. There is no such matter in the record, and contrary to counsel's apprehension we do deny it. The only place in the testimony where Bower's name is mentioned—(and Cobb's not at all)—is in the transcript on pages 173 to 180, and which contains all that was said about Bowers, nothing being said about Cobb and no intimation that Bowers had agreed with Plainiff in error. And as for the statement made in consul's brief—there is absolutely nothing to support it. As stated above, there was no exception taken to this part of the charge to the jury; but in passing we may say that the only construction ever put upon this Act by the Department having charge of the fisheries is contained in the report of the Deputy Commissioner of Fisheries, Dr. E. Lester Jones, for the year 1914 (Gov't. Printing Office, 1915), which gives the same meaning to the Act as has been given by the trial Court herein.

Counsel's citations under this head are based upon an "if." They say: "IF the statute **** provides for the appointment of **** officers", "and IF they were fish wardens", "and IF the construction****was*****a departmental construction", "the instruction of the Court given is erroneous."

This is somewhat like Peter's "IF" in *Romeo and Juliet*, where the nurse says to Peter:

"And thou must stand by too, and suffer every knave to use me at his pleasure?"

“Peter. I saw no man use you at his pleasure; IF I had, my weapon should quickly have been out, I warrant you. I dare draw as soon as another man, IF I see occasion in a good quarrel, *and the law on my side.*”

Counsel’s IF is like Peter’s IF; it is impossible to argue it.

III.

As to the third sub-division of the argument of plaintiff in error, that which actually occurred in court at the time the verdict was rendered appears on pages 327-328 of the transcript, and not as plaintiff in error has stated in his brief. It is true, that after the trial in the court below, plaintiff in error pursued what we consider a rather reprehensible practice and procured the signatures of some of the jurors to affidavits which they now set up as basis for an argument to impugn the verdict of the jury. On pages 327-328 of the transcript, as stated above, the following appears to have occurred at the rendition of the jury’s verdict:

“At about 5 o’clock P. M. October 30, 1914, the jury returned into court; whereupon the following proceedings were had: The roll of the jury was called; each juror answered to his name.

The Court: Gentlemen of the jury: Have you agreed upon a verdict?

The Foreman: We have.

The Court: Hand it to the bailiff.

The bailiff takes the verdicts and hands them to the Court who opened the verdicts and handed them to the Clerk.

Foreman of the Jury: Judge, is there any way we can modify that?

The Court: You mean you want to ask for the clemency of the Court, is that it?

Mr. Gabbs (Foreman of the Jury): Yes, that is it. We think that while the defendant has violated the letter of the law it has not violated the spirit of the law.

The Court: Well, if you wish, you may insert in your verdict 'with recommendation of the mercy of the Court.' If you have agreed upon that.

Mr. Gabbs: We have.

The Court: Then you may sit here and insert it right in your verdict.

The Foreman: Would the word 'clemency' be the same thing?

The Court: Yes.

Whereupon the Court read the verdicts and defendant's attorney, Mr. Winn, requested thereupon that the jury be polled.

Thereupon the Clerk polled the jury, asking each juror individually, 'Is this your verdict?' Each juror answered, 'Yes, it is.'

The Court: Mr. Gabbs, as foreman of the jury,

you will make the statement you have made to me a while ago.

Mr. Gabbs: *We agreed that the defendants are found guilty as charged*; but thoroughly believe they have erred in the letter of the law and not in the spirit of the law.

The Court: Very well; let the record show that.

Mr. Winn: Your Honor, please, under that statement made (to save the record) by the foreman of the jury, we object to the receiving and filing of these verdicts as the verdicts of the jury.

The Court: Let the record show that."

While denying that this proceeding constituted the rendition of special verdicts in this case and without admitting the right of the jury in this jurisdiction to render special verdicts (and it has never been the practice in this District to do so), we contend that a special verdict, where permissible, is one finding facts only, and it is for the Court to draw therefrom the conclusions of law.

In this case Mr. Gabbs, the foreman of the jury, attempted to interpret the law, (which was a matter entirely outside of his province as a juror and contrary to the Court's instructions to him) by stating what he believed the spirit of the law to be; and it was his own individual statement merely. That counsel for plaintiff in error had previously offered and asked the Court to give certain instructions to the jury containing the words "spirit

of the law" may or may not account for the choice of words used in that expression by Mr. Gabbs.

The question of intent does not enter into this requirement of the act, and it would be a farce to render any verdict other than one of guilty in this case under the circumstances and under the law as given by the Court in its instructions, and under the evidence as heard by the jury. The law provides that the things commanded to be done must be done and that is all there is to it. If the plaintiff in error did not do what it was commanded to do, it was guilty. And the jury at all times insisted that the defendant was guilty. We do not imagine that Mr. Gabbs when he made that remark to the Court figuratively held the Standard Dictionary in one hand and Webster's in the other and intended to tell the Court that the defendant had not destroyed the vital energy of the law but that it had merely choked the breath out of it—merely violated it. But we do know he intended to tell the Court that *all the jury agreed that the defendants are found guilty*—that is unequivocal. He thought he knew more about the intent of the law than the Court did. And finally, Mr. Gabbs having made his statement to the Court, found no echo from any of the other jurors. There was no response or endorsement of his statement, and before he made the insertion in the verdict he himself told the Court that that was exactly what he

meant, that he desired to include in the verdict a recommendation for clemency; and after the verdicts were read to the jury, the jury was polled and each and every one of the jurors said, without equivocation or qualification, that that was his verdict, and, that having been done, it was the verdict of the jury.

The criticisms made by counsel for plaintiff in error on this subject are without basis and therefore need not be commented upon.

We respectfully submit that the pleadings were sufficient, that the Court committed no error with reference to instructing the jury or otherwise, that the Court committed no error in receiving the verdicts of the jury or in refusing a new trial, and that in none of the specifications of error set forth by the plaintiff in error has its contentions been sustained; and that the judgment herein should be affirmed.

Respectfully submitted,

JAMES A. SMISER,

United States Attorney.

JNO. J. REAGAN,

Assistant U. S. Attorney.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

THLINKET PACKING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,,
Defendant in Error.

Reply Brief of Plaintiff in Error

Upon Writ of Error from the United States
District Court for the District of
Alaska, Division No. 1

M. G. MUNLY,
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Reply Brief of Plaintiff in Error

In replying to the brief of the defendant in error, it will probably be well to preserve the three divisions into which the original brief of the plaintiff in error is divided.

Specification of error No. I raises the question of the sufficiency of every count contained in each of the several indictments. Specifications of error Nos. II and IV raise this same question with the added consideration that the evidence introduced by the government did not support the verdicts, finding the defendant guilty of the commission of acts denounced by section 5 of the Act of June 26, 1906 (section 263 of the Compiled Laws of Alaska).

Section 5 of the Act of June 26, 1906, upon which the three indictments filed against the defendant, now plaintiff in error, are based, provides as follows:

“That it shall be unlawful to fish for, take or kill, any salmon of any species in any manner or by any means, except by rod, spear or gaff, in any of the waters of Alaska over which the United States has jurisdiction, except Cook Inlet, the Delta of Copper River, Bering Sea, and the waters tributary thereto, from six o'clock Post Meridian of Saturday of each week until six o'clock Ante Meridian of the Monday following, or to fish for, or

catch, or kill in any manner, or by any appliances except by rod, spear or gaff, any salmon in any stream of less than 100 yards in width in Alaska between the hours of six o'clock in the evening and six o'clock in the morning of the following day of each and every day of the week. Throughout the weekly close season herein prescribed, the gate, mouth or tunnel of all stationary and floating traps shall be closed and twenty-five feet of webbing or net of the "heart" of such traps on each side of the "pot" shall be lifted or lowered, in such a manner as to permit the free passage of salmon and other fishes."

Counsel for the government used two set formulas throughout all of the indictments in attempting to charge the crime of illegal fishing under this statute. Counts 1 and 2 in indictment 1034-B and counts 1 and 2 in indictment 1035-B, charge that the defendant **did unlawfully and wrongfully maintain and operate for fishing certain designated fish traps without having twenty-five feet of the webbing or net of the heart of such trap on each side, next to the pot thereof, lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.**

The balance of the counts in indictments 1034-B and 1035-B and all of the counts in indictment 1036-B, charge that the defendant **did unlawfully and wrongfully maintain and operate for fishing**

certain designated traps without having the tunnel of said trap closed and without having twenty-five feet of the webbing or net of the heart of such traps on each side next to the pot thereof lifted or lowered in such a manner as to permit the free passage of salmon and other fishes.

The defendant filed demurrers to each indictment and to every count contained therein. One of the assignments of demurrer to every count of each of the indictments is as follows:

“That said indictment does not state facts sufficient to constitute any crime against (on the part) of said defendant corporation.” This is followed by a special demurrer to every count of each indictment, which sets up the same assignments throughout, in accordance with the Alaska practice.

Specification of error No. 1 is directed against the action of the court in overruling the said demurrers of the defendant to the indictments herein.

The defendant, now plaintiff in error, contends that every count of each indictment fails to charge any act, denounced as an offense by the statute in question, in that every count fails to charge that the defendant **did fish for, take, or kill any salmon of any species** during the weekly close season.

The plaintiff in error further contends that the acts charged by the indictment are not in themselves offenses under the statute, as the part of the

statute upon which they are based was intended by Congress merely to give effect to other parts of the act, by preventing the commission of any of the offenses denounced by it, and that in effect its provisions are merely directory.

There are no provisions in the act which make the failure to comply with the terms of the passage relative to the closing of traps during the weekly close season, equivalent to the commission of the acts therein denounced as offenses. The act does not directly or inferentially provide that the failure to conform with its directions in the closing of traps shall constitute the crime denounced by the act. In fact, the act does not even go so far as to make the failure to comply with the trap closing regulations **evidence** of the commission of the offense it denounces.

Under the rules of construction prevailing in the courts of the United States, a legislative act is to be interpreted according to the intent of the legislature apparent upon its face. The intent of the lawmaker is the law.

U. S. v. Fisher, 109 U. S. 145.

Jones v. Guarantee, etc., Co., 106 U. S. 626.

The statute in question shows plainly upon its face that it was the intention of Congress to denounce certain specific acts as offenses and it very clearly shows just what acts were included in this denunciation. Its express provisions as to what

acts are included is absolutely incompatible with the contention of counsel for the government. It shows upon its face that it was intended to denounce **the fishing for, the taking, and the killing of salmon.** Any other matter included therein was incorporated in order to assist in reaching the end desired by the framers of the statute, viz: **the prevention of salmon fishing during the weekly close season.**

The citations of the district attorney to Bishop's Criminal Procedure, as well as his quotations from Starkey and Chitty (pages 20, 21, 22 and 23, defendant in error's brief), are mere generalities and have no bearing upon the question at issue **as they take for granted that the charge of the grand jury in an indictment is based upon a statute denouncing the particular acts charged as offenses.**

In the case at bar the indictments absolutely fail to charge any of the acts denounced as offenses in the statute.

After citing Chitty, Starkey and Bishop concerning the necessity of the indictment following the statute in charging the offense, counsel for the government makes this significant statement concerning the charges embodied in the indictments in this case, page 25, brief of defendant in error:

"This is charging the offense in haec verba of the statute **except the statute says: 'It shall be unlawful to fish for, etc.,'** while the indictment de-

scribes the offense by charging 'did unlawfully maintain and operate for fishing, etc.'

Now it is clear that to maintain and operate for fishing is simply another way of saying 'did fish by means of a fish trap.' 'To operate for fishing is to fish.' Now if the defendant did fish by the means of a fish trap in the manner and under the circumstances set out in the indictment then surely the law would be violated."

What counsel means by the charging of the offense in the haec verba of the statute is very hard to determine under the circumstances.

He contends that he charged the offense denounced "in the haec verba of the statute" and then in effect says **except the part of the statute that names and defines the offense.** This statement is absolutely contradictory and not a little startling, as it is an absolute admission by counsel, while protesting that the statute was followed, that in fact the statute was not followed.

Counsel for the plaintiff in error quite agrees with the district attorney that a part of the statute is followed in effect in the charging part of the indictments and that another part of the statute is absolutely ignored therein. Counsel also takes the view, however, that the part of the statute omitted by the district attorney is the part which it is absolutely necessary to follow in order to charge the crime denounced by the statute, **as that is**

the only part of the statute that actually specifies what the crime is, and defines the manner in which it may be committed.

Counsel for the government could not have made a more complete confession of the correctness of the contention of the plaintiff in error, and the fact that the indictments do not follow the statute in charging the crime, must stand as admitted by the government.

Counsel for the government attempts to modify this admission by the statement that "it is clear that 'to maintain and operate for fishing' is simply another way of saying 'did fish by means of a fish trap.'" Unfortunately for his contention, the authorities do not bear him out on this point but on the contrary the weight of authority is against his contention. While we are not willing to admit that "did fish by means of a fish trap" is equivalent to "did fish for, take or kill by means of a fish trap," we are equally positive in our belief that the words "to maintain and operate for fishing" do not specify any of the acts denounced as offenses by section 5 of the Act of June 26, 1906.

An indictment is fatally defective if an essential element of the crime intended to be charged is omitted, and the sufficiency of the indictment is to be tested by ascertaining whether it contains every element of such offense. All matters required by the act as prerequisites to a criminal conviction must

be set out in the indictment in order to make it sufficient, and as nothing in a criminal case can be charged by implication, intendment, or recital, every fact necessary to be proven to constitute the crime must be directly and affirmatively alleged.

U. S. v. Hess, 124 U. S. 483.

U. S. v. El Paso N. E. R. Co., 178 Fed. 845.

U. S. v. Carll, 105 U. S. 612.

U. S. v. Simmons, 96 U. S. 360.

Commonwealth v. Clifford, 8 Cush. (Mass.)
215.

Commonwealth v. Bean, 11 Cush. (Mass.)
414.

Commonwealth v. Bean, 14 Gray (Mass.) 52.

Commonwealth v. Filburn, 119 Mass. 297.

U. S. v. Louisville & N. R. R. Co., 165 Fed.
936.

U. S. v. Post, 113 Fed. 852.

U. S. v. Marx, 122 Fed. 964.

Upon applying the test laid down by the above cited cases to the indictments at bar, for the determination of their sufficiency, it will be readily seen that they do not come up to the requirements therein specified.

The indictments at bar do not contain every es-

sential element of the crime intended to be charged, as nowhere do they charge that the defendant **fished for, took or killed any salmon of any species**. The indictments do not set up all the matters required by the act as prerequisite to a criminal conviction. **They do not charge the defendant with fishing as defined and prohibited by the act**. The indictments do not directly and affirmatively allege every fact necessary to be proven in order to constitute the crime charged, **because they do not allege that the defendant committed the crime denounced by the statute**.

In order to support the contention of the district attorney (page 25, defendant in error's brief) it would be necessary to put a very strained construction upon the charges contained in the indictments, and to read matter into them that they do not contain. It is very doubtful whether the indictments charge the offense of illegal fishing even by implication, because they do not contain any allegations necessary to complete the charge, and because they wholly omit to charge the gist of the offense.

What sustaining force counsel for the government finds in the cases of *U. S. v. Carll*, 102 U. S. 612, *U. S. v. Cook*, 17 Wall. 168, and *U. S. v. Simmons*, 96 U. S. 360, cited in his brief (page 25) is hard to perceive, as they are all against the contention in support of which they are cited.

The indictment must charge all the elements

which constitute the crime so particularly as to enable the defendant to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense.

U. S. v. Hess, 124 U. S. 483.

U. S. v. Cruikshank, 92 U. S. 524.

U. S. v. Simmons, 96 U. S. 360.

None of the indictments in the case at bar comply with this requirement for the reason that any acts charged, are averred in such a vague, incomplete and indefinite manner that convictions or acquittals in the present prosecution would not suffice as a bar to a subsequent prosecution of defendant for the same acts under the same section of the statute, where these acts charged as the fishing for, taking or killing of salmon, in any subsequent prosecution.

This is plainly contrary to the spirit of the criminal jurisprudence of the United States courts, and in the light of the decisions just cited, is sufficient to render these indictments fatally vulnerable to demurrer.

The charge of counsel for the government (page 29, brief of the defendant in error) that counsel for the plaintiff in error have been content with the mere filing of demurrers, in the several cases here consolidated, and have never attempted to

support them by argument except in a very limited and partial manner, is absolutely incorrect.

At the time the various demurrers came on for argument, counsel for the plaintiff in error advanced practically all of the objections to the indictments that were later embodied in the objections made at the beginning of the trial, said objections being shown by the record, page 59, and used almost the identical arguments that are set out in this brief and the brief previously filed. This is subsequently admitted by the district attorney (page 30, brief of defendant in error).

We therefore respectfully submit that the assignment of demurrer, directed to each indictment generally, and to every count therein contained specially, and specifying "That said indictments and counts do not state facts sufficient to constitute a crime against (on the part of) said defendant corporation," sufficiently raise this issue and that the demurrers to the several indictments should have been sustained by the trial court.

Specification of Error No. II, THAT THE TRIAL COURT ERRED IN OVERRULING AND DENYING DEFENDANT'S OBJECTIONS MADE AND FILED AFTER THE EMPANELING OF THE JURY AND WHEN THE FIRST WITNESS FOR THE PLAINTIFF WAS PLACED UPON THE WITNESS STAND AND SWORN TO TESTIFY, raises the same issues as to the sufficiency of

the indictments that are presented by the demurrers.

These objections in fact present the substance of the arguments advanced by the plaintiff in error at the time the demurrers came on for hearing.

In discussing these objections, counsel for the government cites the case of *Morris v. U. S.* 161 Fed. 672 (incorrectly cited as *Miller v. U. S.*), (page 31 defendant in error's brief) and contends that the practice of making objections of this kind in criminal cases is not recognized in the United States courts.

The district attorney is in error in this regard. All that was decided in the *Morris* case was that, as the state courts of Missouri and Kansas did not recognize this practice, the Federal courts in these jurisdictions following the state practice, would also refuse to recognize it. However, this is merely a matter of local practice, and as the territorial courts of Alaska have followed the practice of recognizing objections of this nature, it would seem that the contention of counsel for the government is not well founded.

Counsel for the government has also taken exception (page 31, brief of defendant in error) to the fact that these objections do not seem to have been regularly filed in the cause, as they bear no date or file mark. Counsel for the plaintiff in error do not believe that this exception is well taken

as the record shows plainly (pages 59-60) that these objections were made in open court and duly overruled by the presiding judge. That the clerk neglected to stamp a file mark upon them should be of no concern to the plaintiff in error, as any clerical mistake on the part of the clerk of the court in this respect, cannot be charged to it. The record plainly shows, however, that these objections were not only duly filed in open court, but that they were also orally read into the record by counsel for the plaintiff in error.

Counsel for the government also points out (page 31, brief of the defendant in error) that "these objections are repeated and set out in the transcript a number of times with great prolixity and redundancy for what good purpose it would be difficult to say. Transcript, pages 59-64, 79-90, 100-114, 152-154."

Counsel for the plaintiff in error heartily agrees with the learned district attorney upon this point.

For what purpose, good or otherwise, these objections as well as the other parts of the record, are set up, duplicated and triplicated throughout three hundred and fifty-five printed pages, at enormous expense to the plaintiff in error, when everything necessary could have been included in one-third of this space, is not apparent and therefore must remain a subject of speculation.

The plaintiff in error objected to the consolida-

tion of these cases and moved for separate trials, but this motion was overruled, and the cases consolidated, and tried. An order, based upon a stipulation between counsel, was entered by this honorable court, consolidating these cases for the purpose of this appeal, and as the records of each of these cases are absolutely identical, and as the same questions are involved in each appeal, there is no reason for such duplication of the record.

Besides being very costly to the plaintiff in error the transcript is compiled in such a complicated manner as to seriously embarrass and delay both court and counsel in considering its contents.

ERROR OF THE COURT IN OVERRULING DEFENDANTS MOTION FOR NON-SUIT OR INSTRUCTED VERDICT.

ASSIGNMENT OF ERROR NO. IV.

Assignment of error No. IV is directed against the action of the court in overruling the defendant's motion for non-suit or instructed verdict.

This specification of error not only raises many of the same questions that are raised by the demurrers and objections but also raises a vital question as to whether or not the evidence introduced by the government was sufficient to support the verdicts finding the defendant guilty of the commission of the acts denounced by section 5 of the act of June 26, 1906 (section 263 of the Compiled Laws of Alaska).

In this regard, counsel for plaintiff in error wishes to direct the attention of the court to the summary of the testimony and evidence upon which the verdicts were based, given and offered by the witnesses produced, sworn and examined by the government in the causes at bar, as it appears between pages 32 to 41 inclusive, in the brief of the defendant in error. This summary shows that no witness testified that at the time the

defendant is accused of illegal fishing any one of the traps was in fact fishing. All the testimony is confined to the fact that the traps were not adjusted in the manner recommended by the statute. Not one witness testified to the fact that the traps were fishing upon these occasions and there is not one scintilla of evidence to this effect. As a matter of fact, it would not be possible for the traps to catch a single fish in the condition the government's witnesses claim they were in. In fact, the district attorney states (page 56, brief of defendant in error): "We maintain that it is not necessary to allege that it (referring to the traps) caught a single fish. The law places no such burden upon the government. It plainly commands that the traps during the close season shall be maintained as prescribed under penalty of its violation."

On page 57, he further states: "It is true * * * the learned trial judge held that this proof was unnecessary * * *." We therefore earnestly contend that the court erred in overruling the motion for a non-suit or instructed verdict as there was no evidence introduced by the government tending to show that the defendant either fished for, took or killed any salmon of any species in any manner or by any means, during the weekly close season, in violation of section 5 of the Act of June 26, 1906, upon which the indictments purport to be based.

Counsel for the government has gone into a long and detailed discussion concerning fish traps,

their operation, and as to the manner in which fish pass through traps of the type used by the defendant. Counsel for plaintiff in error will not, at this time, attempt to answer this, as we do not believe that it has any good foundation in the evidence introduced in the case, or that it can have any higher value than the personal opinion of the district attorney. The whole discussion is infinitely biased, and unfair in every particular, and is not the work of an authority upon the subject of trap fishing.

It is told that Abraham Lincoln, in advising a young criminal lawyer, once said: "If you have a good case, stick to the evidence; if you have a poor case, rap the people's witnesses; if you have no case at all, hammer the district attorney."

This policy, in the inverse, has obviously been the course of the counsel for the government throughout of his brief. He has not stuck to the law to fortify and strengthen his contentions, but has merely contented himself with hammering the plaintiff in error, its witnesses, and counsel, and has made no attempt to justify the government's contentions by any sound judicial precedent.

Assignments of error numbers V, VI, VII, VIII and IX, are directed against the action of the court in REFUSING TO GIVE THE JURY CERTAIN INSTRUCTIONS REQUESTED BY THE DEFENDANT, AND IN GIVING TO THE JURY

CERTAIN OTHER INSTRUCTIONS DULY EX-
CEPTED TO BY SAID DEFENDANT.

The instructions refused by the court and tendered by the defendant, were a fair and correct statement of the defendant's position in the matter at issue, and of the true meaning of the law as it concerns the closing of traps during the weekly close season. It is the contention of the counsel for the plaintiff in error herein, that the whole purpose of this act as applied to traps, is to give effect to the part of the statute prohibiting the taking and killing of fish during the weekly close season, and that within the intendment of this act, any raising and lowering of the trap sufficient to permit of the free passage of salmon and other fishes and prevent their being caught by the traps, is ample under the law.

The instruction of the court set out under the sixth assignment of error, in which instruction the raising and lowering of the window pane was used as an illustration of the manner in which the law intended the trap should be raised or lowered, is far from being lucid, succinct, plain and illuminating, as contended by the district attorney. It is, on the contrary, highly argumentative and unfair in its nature. It assumes as a fact that what is necessary to the free passage of air, is necessary to the free passage of fishes. As a matter of fact, no such elaborate steps are necessary to afford a relatively free passage

for fish, as this instruction would imply. It is not to be assumed for a moment that the learned court would wish to state as a fact that if two or three pieces of string were suspended within the window opening, or if a spider web covered the corner of it, that the volume of air passing through the window would thereby be materially affected or decreased, or that the difference in the volume of air would be noticeable to persons occupying the room, under those conditions.

At the time this exception was taken, counsel for the plaintiff in error was under the impression that exceptions had been entered to the whole of the charge of the court, and to each and every one of his instructions in particular, as being argumentative and unfair to the defendant. However, through some inadvertence on the part of counsel, this instruction seems to be the only one included within the assignments of error. In order to appreciate the objectionable nature of this instruction, it is necessary to take into consideration the court's charge to the jury, as a whole. These instructions, as the subsequent actions of the jury plainly show, not only intimidated the jury but gave it a very wrong impression as to the extent and scope of its province and function in the trial of this case, and led the jury to believe that there was no possible way for them to find a state of facts other than the state of facts inferentially outlined to them in the court's charge.

It is true, as pointed out in the answering brief of the district attorney, pages 66 and 67, that the record does not show that any exception was reserved by the plaintiff in error to the instruction of the court set up as specification of error number X, in plaintiff in error's brief. It was only after this matter was called to the attention of counsel by the district attorney's brief, and a thorough investigation of the record made, that this oversight was discovered, and it was a matter of no small surprise to the counsel for plaintiff in error, as they had believed that their objection to this instruction had been embodied in the assignment of errors as shown by the record.

This instruction was so absolutely erroneous that it, in itself, would have been grounds for reversal of the judgments of the court below.

The counsel for the government, in its answering brief, pages 67 to 70, discusses the question of trap fishing and of the free passage of fishes during the weekly close season, in a very academic manner, and proceeds on the hypothesis that in order to allow the free passage of fishes, the way must be clear from the bottom to the surface of the water. This is fundamentally incorrect, and if true, would render it impossible for any fish to negotiate the necessarily shoal waters through which they must proceed on the way to their spawning grounds, as the bottom in such surroundings is an uneven mass of ledges, pinnacles, and ob-

structions of all sorts, upon which kelp and other sea weed grows in great profusion and presents a highly formidable barrier from the crests of such obstruction to the surface of the water, through which all fish must pass.

Counsel's statement as to the construction put on the act by Dr. E. Lester Jones, Deputy Commissioner of Fisheries for the year 1914, is manifestly unfair, as at the time the traps were being operated in the manner complained of, Dr. Jones had in no way given notice of a modification of the previous policy of the department regarding the closing of traps during the weekly close season.

It is hard to determine the viewpoint of the district attorney in his declaration that all of counsel's citations are based under the head of IF. The humor of the district attorney at this point borders on the sublime; but counsel would like to suggest that if he had spent the time in searching for judicial precedents that he has evidently expended in uncovering this apt quotation from Shakespeare, his brief might be more in keeping with the subject under consideration.

The three following assignments of error, viz:
 ERROR ON THE PART OF THE COURT, 1st:
 IN RECEIVING AND FILING OVER THE OB-
 JECTIONS OF THE DEFENDANT THE THREE
 VERDICTS RETURNED HEREIN, AS VER-

VERDICTS OF THE JURY (SPECIFICATION OF ERROR NO. XI); 2d: IN OVERRULING DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS, OR TO CONSIDER AND TREAT THEM AS VERDICTS OF ACQUITTAL (SPECIFICATION OF ERROR XII); 3d: IN OVERRULING THE MOTION FOR A NEW TRIAL (SPECIFICATION OF ERROR XIII); 4th: IN RENDERING JUDGMENT HEREIN AND IMPOSING FINES UPON THE DEFENDANT (SPECIFICATION OF ERROR XIV); are directed against the act of the court in refusing to accept the real verdicts returned by the jury and in directing the jury to return verdicts of guilty against the defendant as shown by the record, pages 327-328, and the uncontroverted affidavits of the jurors incorporated therein.

THE FINDING OF THE JURY THAT THE DEFENDANT WAS NOT GUILTY OF VIOLATING THE SPIRIT OF THE LAW WAS A FINDING INCOMPATIBLE WITH THE GUILT OF THE DEFENDANT AND WAS EQUIVALENT TO AN ACQUITTAL.

Counsel for the government in their brief, pages 75 to 79, have treated the questions raised by these assignments of error, as worthy of but slight consideration. Without citing any law and relying chiefly upon ridicule to support them, they have sought to minimize the importance of the points raised.

The contention advanced by the district attorney that the foreman of the trial jury was attempting to interpret the law in the case, thereby going outside his legitimate province as a jurymen, is shown upon the face of the record to be groundless. The same is true of the insinuation that the foreman was alone in his conclusions, and that the rest of the jury were not in sympathy with them.

It is indeed true that the interpretation or construction of the law is outside of the province of the jury, but it is also true that the application of the law as interpreted and construed by the court, to the facts as found by the jury, is clearly within its legitimate province. If this were not true, to use

the classic language of Lord Vaughan in Bushell's case (Vaughan's Reports p. 146) "every one sees that the jury is but a troublesome delay, which were a strong and new found conclusion, after a trial so celebrated for many hundreds of years in this country."

The relative provinces of the court and of the jury are too well marked and defined to be questioned or elaborated upon at this late day. The jury, having power to determine all questions of fact, must, in order to carry out its function of rendering a general verdict, necessarily have the corresponding power of applying the law (as interpreted and construed by the court) to the facts as determined by it. If a jury was without the power of applying the law, acquired from the court, to the facts that it has found, juries could never render general verdicts but must needs resort to the rendition of special verdicts, which would amount merely to the finding of facts. This would result in incomplete verdicts which in each case, in order to be completed, would require a conclusion of law from the court. In any event, in completing a verdict by its conclusion of law, the court would certainly have to apply the law to the facts found in the same manner as a jury in returning a general verdict.

As the determination of the facts upon which the verdict is based is wholly within the province of the

jury, and as a court or no other person outside of the jury can have any knowledge whatever concerning this state of facts or question in any manner their sufficiency, or the process of reasoning employed by the jury in its deductions, it must be conclusively presumed that the jury followed the law as interpreted by the court in reaching its verdict, and that any imperfection or insufficiency in the verdict was due to a failure upon the part of the jury to find some vital element or fact necessary to constitute guilt, and not the result of a wilful attempt upon the part of the jury to interpret the law in a manner contrary to the interpretation of the court in its instructions. Therefore it must be granted that the verdict of the jury finding the defendant "not guilty of a violation of the spirit of the law" was the result of the failure of the jury to find some vital fact necessary to the guilt of the defendant, and not an attempt upon its part to place its own interpretation upon the statute in question, as the law can only arise out of the facts and the court cannot know what the facts are until the jury has returned its verdict.

This finding of the jury, under the rule laid down in *Holy Trinity Church vs. U. S.* 143 U. S. 459, which has been consistently followed by the courts of the United States since first enunciated by Mr. Justice Brewer, was certainly a finding that the defendant was not guilty of the crimes charged in the indictment, as it absolutely negatived the

presence of an element essential to constitute the defendant guilty of the offense upon which the indictments purport to be based. That the jury actually made this finding and wished to return verdicts which would give it effect, is conclusively shown by the record. The jury had been supplied with only two forms of verdict for each indictment, a set of blank verdicts to be used in case the defendant was found guilty of the offense charged in the various indictments, and a set of blanks to be used in case it was acquitted.

The jury, after retiring to deliberate, by some process of reasoning reached a very significant conclusion and determined upon the rendition of a verdict which should embody this conclusion. The actual determination that the jury reached was that the government had proved the commission of no act upon the part of the defendant, which was denounced by, or came within the statute, upon which the court had instructed them.

Unfortunately, the jury had not been sufficiently instructed as to the true significance of such a finding, or provided with the facilities for returning it in the form of a verdict. They had just listened to a very aggressive and highly argumentative instruction by the court, warning them not to invade his province, or interfere with his prerogatives in any manner. The instruction was embodied in language calculated to impress the jury with the idea that their province was very small and that of

the court very broad, that in fact the scope of their inquiry into the matters at issue, was very limited and circumscribed, and subject at all times to the supervision of the court, and consisted merely of the finding of certain facts connected with the transactions involved.

After listening to such an exhortation, it is not probable that any jury would attempt to arrogate any of the prerogatives of the judge or attempt to "interpret the law" as alleged by the district attorney. The subsequent actions of the jury as shown by the record, absolutely prove that they had no such intention. After reaching a determination, by processes of reasoning which can be known to none but themselves, a determination which they not only had the power but the absolute right to make, the jury found that they had been provided with no suitable form to return their verdict. With the instructions of the court still fresh in their minds and with the evident intention not to interfere with any of the prerogatives of the court, the jury decided to go to the court and inform him orally, and explain and modify the form verdict, which they had a right to do under any circumstances.

Before any verdict had been read, and probably before the court had even seen the verdicts as shown by the record (page 327), the foreman of the jury stated as follows, "**Judge, is there**

any way to modify that?" (at this time no verdict had been entered, accepted or even read.) The judge evidently not apprehending the nature of the request, then asked if it was the desire of the jury to recommend mercy. The foreman answered that it was and then orally delivered the finding of the jury as shown by the record (page 327) in the following language: **"We think that while the defendant has violated the letter of the law it has not violated the spirit of the law."** This was an absolute finding upon the part of the jury, upon a consideration of fact.

It had found no fact to convince it beyond a reasonable doubt that the defendant had committed acts sufficient to bring it within the operation of the statute. It was a finding based entirely upon matters of fact, and not an attempt to place any construction or interpretation upon the statute other than that placed upon it by the court. In fact, it must be presumed conclusively that the jury in their deliberations accepted the meaning placed upon this act by the court, as there is nothing to show that they did otherwise.

A jury, while it has not the **right** to disregard the instructions of the court upon the law, in returning a verdict, has the **power** to do so when the issue is merely whether the defendant is guilty or not guilty of the offense charged, and a verdict so rendered can not be questioned. *Sparf v. U. S.* 156 U. S. 51 (page 80.)

It is indeed within the power of a jury to return a verdict of "not guilty," upon the general issue, against the instructions of the court, as to the law, if it so desires, and such a verdict could not be questioned, as the fact could never be shown that the jury had not reached its verdict upon a failure to find sufficient facts to justify a conviction. It is also true that the jury may, without fear, openly disregard the instructions of the court in returning its verdict, as this is a power that the jury must have as long as it has the power to return a general verdict.

One of the earliest and most classic judicial expositions of this principle is found in Bushell's case (Vaughan's Report, page 146).

Bushell, one of the jurors on the trial of Penn and Mead, had been committed by the court for finding the defendant not guilty against the direction of the court in a matter of law, and, being brought before the court of Common Pleas by "habeas corpus," this cause of committment appeared upon the face of the return to the writ. It was contended by the counsel against Bushell, upon the authority of the maxim, "*Ad quaestionem legis non respondent juratores*," that the commitment was legal, since it appeared by the return that Bushell had taken upon him to find the law against the direction of the judge, and had been, therefore, legally imprisoned for contempt. It was

upon that occasion that Chief Justice Vaughan, with the concurrence of the whole court, repeated the maxim, "*Ad quaestionem legis non respondent juratores*," as cited by the counsel for the crown, but denied the application of it to impose any restraint upon jurors trying any crime upon the general issue. His language is too remarkable to be forgotten, and too plain to be misunderstood. Taking the words of the return to the "*habeas corpus*," viz: "That the jury did acquit against the direction of the court in a matter of law," "These words," said the great lawyer, "taken literally and *de plano*, are insignificant and unintelligible; for no issue can be joined of a matter of law; no jury can be charged with the trial of a matter of law barely. No evidence ever was or can be given to a jury of what is law or not; nor any oath given to a jury to try matter of law alone; nor can any attain be for such a false oath. Therefore we must take off this veil and color of words, which make a show of being something, but are in fact nothing; for, if the meaning of these words, '*finding against the direction of the court in matter of law*,' be that, if the judge, having heard the evidence given in court (for he knows no other), shall tell the jury, upon this evidence, that the law is for the plaintiff or the defendant, and they, under the pain of a fine and imprisonment, are to find accordingly, every one sees that the jury is but a troublesome delay, great charge, and of no use in

determining right and wrong, which were a strong and new found conclusion, after a trial so celebrated for many hundreds of years in this country.”

Blackstone, after commenting in the third volume of his Commentaries, upon the excellence of trial by jury in civil cases, expresses himself thus (Vol. 4, page 349):

“But it holds much stronger in criminal cases, since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another to settle the boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier of a presentment and trial by jury between the liberties of the people and the prerogative of the crown. Without this barrier, justices of oyer and terminer named by the crown might, as in France or in Turkey, imprison, dispatch, or exile any man that was obnoxious to government, by an instant declaration that such was their will and pleasure; so that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations, which may sap and undermine it.”

Lord Erskine, in his famous argument before Lord Mansfield in the case of the Dean of St.

Asaph, which has always been regarded as one of the great legal masterpieces, comments upon this point as follows:

“When these things are attentively considered, I might ask those who are still disposed to deny the right of the jury to investigate the whole charge, whether such a solecism can be conceived to exist in any human government, much less in the most refined and exalted in the world, as that a power of supreme judicature should be conferred (on the jury) at random by the blind forms of the law, where no right was intended to pass with it, and which was upon no occasion and under no circumstances to be exercised; which, though exerted notwithstanding in every age and in a thousand instances, to the confusion and discomfiture of fixed magistracy, should never be checked by authority, but should continue on, from century to century, the revered guardian of liberty and of life, arresting the arm of the most headstrong government in the worst of times, without any power in the crown or its judges to touch, without its consent, the meanest wretch in the kingdom, or even to ask the reason and principle of the verdict which acquits him. That such a system should prevail in a country like England, without either the original institution or the acquiescing sanction of the legislature, is impossible. Believe me, my lord, no talents can reconcile, no authority can sanction, such

an absurdity. The common sense of the world revolts at it."

If the jury, in the case at bar, had wished to disregard the instructions of the court and place their own interpretation upon the law as contended by the district attorney, there would have been no easier way for them to have done this than to have returned verdicts of "not guilty" upon the general issue. But the jury showed that they had no such wish or intention, as they honestly and in open court, through their foreman, put their finding up to the court for what it was worth. The insinuation of the district attorney that the finding of the jury as stated by their foreman, Mr. Gabbs, was a statement of the individual opinion of Mr. Gabbs only, is shown to be incorrect by the uncontroverted affidavits of five of the other jurors, incorporated in the record on pages 73 to 75 inclusive. It is also untrue that the foreman or any of the other jurors attempted to state what they believed the law to be.

When the jury had returned with the finding **that the defendants had violated the letter of the law and not the spirit of the law**, under the rule laid down in *Holy Trinity Church vs. U. S.*, supra, it became the duty of the judge to do one of three things: 1st, to have the verdict entered in the form in which it was orally delivered by the foreman of the jury; 2d, to have the finding entered as a special verdict to be completed by a conclusion

of law from the court; or 3d, to have instructed the jury that if this were their finding, they should sign and return the verdict of acquittal, as under the law the defendant could not be guilty of the offense denounced by the statute upon such a finding.

The last course would probably have been the best, and the course most usually followed under the circumstances, but any one of these three alternatives would have served to have preserved the defendant's constitutional right of trial by jury, and would have resulted in its vindication.

If the court had followed the first course, the defendant must have stood acquitted, as where a verdict is entered that does not respond to, or negatives the issue on trial, it must be treated as a verdict of not guilty of the offense with which the defendant is charged.

Ex parte Harris, 128 Pac. 156.

Vickers v. U. S., 1 Okla. Cr. 458; 98 Pac. 469.

State v. McBride, 19 Mo. 239.

Little v. Larrabee, 2 Greenl. 38.

People v. Ah Ye, 31 Cal. 452.

In Re McVey, 5 Nebr. 481; 70 N. W. 51.

Territory v. Doe, 1 Ariz. 507; 25 Pac. 472.

If the second course had been followed, it is certain that the court, upon reflection, would have

entered a verdict of "not guilty," as he could not well have done otherwise that enter such a verdict upon so incomplete and negative a finding, especially as an essential element of the offense had been directly negated by the finding itself.

People v. Wells, 8 Mich. 106.

State v. Morris, 104 N. C. 837.

12 Cyc. 690 and cases under Note 8.

Under the circumstances it was at least the duty of the court to instruct the jury that their finding was incompatible with the guilt of the defendant and that the defendant was, therefore, entitled to a verdict of acquittal.

THE VERDICTS OF "GUILTY" ENTERED AGAINST THE DEFENDANT WERE ENTERED AT THE DIRECTION OF THE COURT AND WERE A DIRECT VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A TRIAL BY A JURY.

The court, instead of following any appropriate course at this stage of the proceedings took the case out of the hands of the jury and directed the foreman to return verdicts of guilty with recommendations addressed to himself for mercy incorporated therein.

Before the verdicts had been accepted, read, or entered of record, and after the foreman had orally delivered the real finding of the jury, the court addressed the jury as follows (Record, page 327): **"Well if you wish, you may insert in your verdict"** (a verdict finding the defendant guilty) **"'with recommendation to the mercy of the court,' if you have agreed upon that"** (referring, no doubt, to the finding of the jury). The court, upon being informed that they had so agreed, then said (Record, page 327): **"Then you may sit here and insert it right in the verdict"** (i. e., the verdict of guilty). The court then directed that the verdicts of guilty be read by the clerk and after the jury had been polled, counsel for the defendant objected to the receiving and filing of the verdicts as verdicts of the jury

(Record, page 328), which objection was thereupon overruled, and the verdicts received and filed by order of the court.

The defendant by its plea of "not guilty," denied each and every material allegation in the indictment and every essential element of the crime charged, thereby raising the general issue and throwing itself upon the country for deliverance from the crime charged in the indictment by the grand jury. It thereupon became the duty of the trial jury to deliver the defendant from the crime charged unless the government proved to the jury beyond a reasonable doubt that the defendant was guilty of every essential element of the crime charged in the indictment.

The jury by its finding that the defendant had complied with the spirit of the law, and was therefore not guilty of a violation of the spirit of the law, did not find the defendant guilty of one of the most essential elements of the crime charged, and its finding that the spirit of the law had not been violated was essentially a finding of not guilty, as it served absolutely to negative the fact of the existence of this most essential requisite of the offense charged, to-wit: the violation of the "spirit of the law."

When the jury reported this finding in open court, it became the duty of the presiding judge, either upon the motion of counsel or independent

of the motion of counsel, to instruct the jury that if they believed that the defendant had not been guilty of a violation of the spirit of the law, it was their duty to return a verdict of not guilty in each case, or to take other appropriate action.

Unfortunately, either through inadvertence or failure to recognize his duty in the premises, the court told the jury that what they meant was a recommendation for leniency, and if so, to write it into their verdict finding the defendant guilty.

By so doing the judge absolutely stepped into the jury box and arrogating to himself the constitutional power of the jury and setting aside the finding of that body, which was equivalent to an acquittal, directed it to return a verdict of guilty with a recommendation addressed to himself asking that the defendant be shown mercy at his hands.

The law reports do not contain a more striking instance of the violation, by a court, of a defendant's right to a trial by jury, in a criminal case. The action of the court in the case at bar cannot be excused or condoned without jeopardizing the constitutional rights of all persons accused of crime and it cannot be explained or justified upon the plea that the jury was attempting to interpret the law. The verdicts stand impeached upon the face of the record, and to allow them to stand in their present status would be a travesty on justice and

a violation of the defendant's constitutional right of trial by jury.

In the case at bar, the violation of the defendant's right of trial by jury, occurred under circumstances different from those under which this question ordinarily arises, but the United States and Federal Reports present numerous instances where the trial courts have been reversed for directing verdicts of guilty against persons and corporations on trial for offenses against the United States. In most cases, the question has arisen where it was uncertain whether or not certain language used by the court amounted to a direction to the jury to find the defendant guilty, or whether or not a given case was criminal or civil in its nature, but the courts have been unanimous in condemning this practice, as a violation of constitutional rights, whenever it has appeared that instructions by the court in a criminal case have amounted to a direction to the jury to return a verdict of guilty.

In the leading case of *U. S. v. Taylor*, 11 Fed. 470, McCrary, C. J., says:

"The single question to be determined is whether, in such a case as this, a court may direct a verdict of guilty. It is insisted on the part of the government that, the facts being admitted or settled beyond dispute, the question of guilt or innocence depends wholly upon a question of law, which the court must de-

termine, and that, therefore, the court may direct a verdict either way, in accordance with its opinion of the law. This is the view which was taken by the court below. * * * I find, however, upon an examination of the subject, that, with this single exception, the authorities are, with entire unanimity, against the right of a court in a criminal case to direct a verdict of guilty.

“The constitution guarantees to every accused person ‘the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.’ Sixth amendment. This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner’s consent is erroneous. (Citing *State v. Mann*, 27 Conn. 281.)

“It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.

“The constitution does not deal with the

form, but with the substance, the essence, of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.

“It is doubtless true that, in a certain sense and to a limited extent, this doctrine makes the jury the judges in criminal cases, of both law and fact; but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

“It has accordingly long been well settled that, while the court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never, to my knowledge, been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substan-

tially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is in effect a decision by the court, upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty, or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instruction of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court.

“In view of this, courts have usually gone no further than to say to the jury that while they may, by a general verdict, determine both the law and the facts, it is their duty to believe the law as laid down by the court. * * *

“It is now well settled in the federal courts that in civil cases where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; * * * but not so in criminal cases. A verdict of acquittal cannot be set aside, and therefore if the court can direct a verdict of guilty, it can do indi-

rectly that which it has no power to do directly.

“By his plea of not guilty, the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. That is so notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution.

“In this condition of the testimony it was the right of the jury to pass upon the credibility of the witnesses, even if unimpeached as to character, and to consider whether upon applying all the tests of manner, clear or confused statement, prejudice and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. And even in civil cases, so far as I know, no judge has ever gone further than to say, when the case was at all dependent upon oral testimony, that if the jury believed all the testimony they should find for the plaintiff or defendant.

“The present case, in itself considered, is of little consequence, but the question involved is of far-reaching importance; for if the power to direct a verdict of guilty exists in this case, it exists and may be exercised in any criminal

case, however important, and even if the punishment be death. In view of this, and especially in view of the opinion above cited of Mr. Justice Hunt, for whose judgment I entertain the highest respect, I have considered the case with great care. I have also consulted Mr. Justice Miller, who authorizes me to say that he concurs in the conclusion which I have reached, which is that the district court erred in charging the jury to find the defendant guilty, and in overruling the motion in arrest of judgment.

“The judgment of the district court is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion.”

In the case of the Atchison, T. & S. F. Ry. Co. v. U. S., which was an action by the government to collect a penalty from the railroad company, upon a verdict of guilty being found against said company, Grosscup, C. J., said:

“The principal question in this case is, did the circuit court err in giving to the jury the peremptory instruction to find the plaintiff in error guilty? And this question turns chiefly upon this further question, was the prosecution of plaintiff in error by the United States, in the case under review, the prosecution of a criminal offense? For if it be a criminal offense,

plaintiff in error was entitled to the verdict of the jury respecting its guilt or innocence—not a verdict in form only, but a verdict expressing the real judgment of the jury; for such is the guaranty of the sixth amendment to the constitution of the United States, which provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. (Citing *U. S. v. Taylor* (C. C.), 11 Fed. 470; *Starr v. U. S.* 153 U. S. 625, 14 Sup. Ct. 919, 38 L. Ed. 841.)”

The learned judge, after first determining that this was a criminal prosecution as distinguished from a civil suit to recover a penalty, set the verdict aside on the ground that the trial court had infringed upon the defendant’s constitutional right to a trial by jury.

Atchison T. & S. F. Ry. v. U. S., 172 Fed. 195.

In the leading case of *Sparf and Hansen v U. S.*, 156 U. S. 51, Mr. Justice Harlan in his masterly opinion (page 105), said:

“We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of

criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in *United States v. Taylor*, 3 McCrary, 500, 505; 11 Fed. 470. It was there said: * * *” (He then sets out the language used by the learned court in that case.)

This same rule is laid down by Mr. Justice Gray in his equally brilliant dissenting opinion in this case; discussing this subject, he says (page 174):

“But a person accused of crime has a two-fold protection in the court and the jury, against being unlawfully convicted. If the evidence appears to the court to be insufficient in law to warrant a conviction, the court may direct an acquittal. (Citing *Smith v. United States*, 151 U. S. 50.) But the court can never order the jury to convict; for no one can be found guilty, but by the judgment of his peers.”

Sparf and Hansen v. U. S., 156 U. S. 174.

In the case of *Dolan v. U. S.*, 123 Fed. 52, which came before this court upon a rehearing of an appeal from Alaska, Hawley, J., in discussing the

right of a court to invade the province of the jury by its instructions, says:

“We are of the opinion that the court invaded the province of the jury in the giving of this instruction in this: that it assumed as an established fact that Misener made the statement testified to by Palmer instead of leaving this question of fact to be decided by the jury, contrary to the well-settled principles of the law, and in direct opposition to the provisions of section 157 of the Penal Code of Alaska (Act March 3d, 1889, tit. 2, c. 15, sect. 157, 30 Stat. 1302, c. 429).”

Citing *State v. Hatcher*, 29 Ore. 309-320; 44 Pac. 584-587.

In *Shick v. U. S.*, 195 U. S. 65, Mr. Justice Harlan in his dissenting opinion discussing the right of trial by jury, says (page 78):

“It is suggested that if any conflict exists between the absolute requirement in the original constitution (Art. 3, Sec. 2) that the ‘trial of all crimes, except in cases of impeachment, **shall** be by jury,’ and the provision in the sixth amendment, that the accused, in every criminal prosecution, ‘**shall enjoy the right** to a speedy and public trial, by an impartial jury,’ etc., the latter having been last adopted, must control.

But there is no such conflict. Those who opposed the acceptance of the constitution said, among other things, that the words of that instrument, strictly construed (Art. 3, Sec. 2), admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the government, or of one taking place in a state or district other than that in which the crime was committed. The framers of the constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible ground of uneasiness on the subject, the sixth amendment was adopted, in which the essential features of the trial required by section 2 of article 3 are set forth. In other words, the trial required by that section is the trial referred to in the sixth amendment. And the jury referred to in both the original constitution and in the amendments was, the authorities all agree, the historical jury of the common law, consisting of twelve persons, no more and no less, whose unanimous verdict was necessary to conviction." * * *

“ ‘Except in that class or grade of offenses, called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal **legally constituted for that purpose**, the guarantee of an impartial jury to the accused in a criminal prosecution,

conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void.'” * * *

“But the vital inquiry is, in what way, when the defendant pleads not guilty, are the facts to be ascertained and the plea of not guilty overcome? Under the express words of the constitution the answer must be: by trial before a jury of twelve persons organized to determine whether the charge of guilt be true; the function of the court being simply to conduct the trial and render a judgment in accordance with the verdict of the jury as to the facts. The court and the jury, not separately but **together**, constitute the appointed tribunal which alone, under the law, can **try** the question of crime, the commission of which by the accused is put in issue with a plea of not guilty.

“There are some things so vital in their character that they may not be legally done or legally omitted in a criminal prosecution, even with the consent of the accused. This is abundantly established by authority. The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and

misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases. Certain it is, that felonies and misdemeanors are equally crimes within the meaning of the constitutional provision that the trial of all crimes shall be by jury, and there is no warrant to construe that provision as if it read, 'the trial of all crimes, except in cases of impeachment **and in misdemeanors**, shall be by jury.' "

In *Starr v. U. S.* 153 U. S. 614, Chief Justice Fuller, in discussing the respective duties of court and jury, says (page 626):

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. (Citing *Hicks v. United States*, 150 U. S. 442, 452.) The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises or with the circumspection and caution which should characterize judicial utterances." * * *

“Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them.”

In the case of *Thomas v. The American, etc., Land Co.*, 47 Fed. 550, Speer, J., says (quoting from *Hodges v. Easton*, 106 U. S. 408):

“It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the constitution of the United States. They might have waived that right, but it could not be taken away by the court. * * * The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendant of a verdict by the jury.’”

In the case of *Breese v. U. S.*, 108 Fed. 804, the Circuit Court of Appeals for the Fourth Circuit, in considering this question, said:

“But, inasmuch as the strong opinion expressed by the judge below in his charge to the

jury, in which he used the words 'that, in his opinion, it was the duty of the jury to convict the defendant,' was calculated to mislead the jury, who perhaps construed this language as a direction on the part of the court, we think that it would be proper to grant a new trial. For these reasons the case is remanded to the court below, with instructions to grant a new trial."

Extract from the charge of Chief Justice Jay, in the case of the State of Georgia v. Brailsford, touching on the relative provinces of the court and of the jury:

"It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court; for, as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still,

both objects are lawfully within your power of decision. * * *

“Go then, gentlemen, from the bar, without any impression of favor or prejudice for the one party or the other; weigh well the merits of the case, and do on this, as you ought to do on every occasion, equal and impartial justice.”

Georgia v. Brailsford, 3 U. S. 4.

On this point, see also:

Stettinieus v. U. S., 22 Fed. Cas. Case No. 13387.

U. S. v. Morris, 26 Fed. Cas. Case No. 15815.

U. S. v. Baptiste, 24 Fed. Cas. Case No. 14545.

U. S. v. Greathouse, 26 Fed. Cas. Case No. 15254.

U. S. v. Hodges, 26 Fed. Cas. Case No. 15374.

U. S. v. Wilson, 28 Fed. Cas. Case No. 16730.

Chaffee & Co. v. U. S., 85 U. S. 816.

Thompson v. Utah, 110 U. S. 574-579.

Callan v. Wilson, 127 U. S. 540-557.

State v. Stephanus, 53 Ore. 135.

Comm. v. Anthes, 5 Gray 237.

From the foregoing authorities, it is apparent

that the jury, by finding that the defendant was not guilty of a violation of the spirit of the statute in question, reached a conclusion that was equivalent to an acquittal of the defendant, and which absolutely precluded the court from entering a judgment against the defendant. It is also apparent that the trial judge, by setting aside this finding and by ordering the jury to find the defendant guilty, invaded the province of the jury, and arrogated to himself the constitutional powers and duties of the jury, and thereby impaired the defendant's constitutional rights to a trial by jury.

We therefore respectfully submit that, aside from the fact that the demurrers of the defendant to the indictments herein should have been sustained, and independent of the merits of other assignments of error previously discussed, the trial court erred in RECEIVING AND FILING OVER THE OBJECTION OF THE DEFENDANT THE THREE VERDICTS HEREIN; and also erred in OVERRULING THE DEFENDANT'S MOTION TO SET ASIDE THE VERDICTS RENDERED, OR TO CONSIDER AND TREAT THEM AS VERDICTS OF ACQUITTAL; and erred further in RENDERING JUDGMENTS UPON SAID VERDICTS AND IMPOSING FINES UPON THE DEFENDANT, and that under the circumstances, this honorable court should direct the court below to enter and treat the verdicts rendered herein as

verdicts of acquittal, or grant to the plaintiff in error herein a new trial.

Respectfully submitted,

M. G. MUNLY,
ROBERT N. MUNLY,
WINN & BURTON,
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Appellant,

VS.

GLOBE NAVIGATION COMPANY, a Corpora-
tion, and **S. P. WESTON,** as Trustee in Bank-
ruptcy of the **GLOBE NAVIGATION COM-**
PANY, a Corporation, Bankrupt,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

Filed

AUG 10 1911

F. D. MONTGOMERY
CLK.

No. 2630

United States
Circuit Court of Appeals
For the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation,
and S. P. WESTON, as Trustee in Bankruptcy
of the GLOBE NAVIGATION COMPANY, a Corporation,
Bankrupt,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Western District of Washington, Northern Division.

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*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent.

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),

Substituted Respondent.

Names and Addresses of Counsel.

EDWARD J. McCUTCHEN, Esq., Proctor for
Libelant,

1107 Merchants Exchange Building, San
Francisco, California.

WARREN OLNEY, Jr., Proctor for Libelant,

1107 Merchants Exchange Building, San
Francisco, California.

CHARLES W. WILLARD, Esq., Proctor for Libel-
ant,

1107 Merchants Exchange Building, San
Francisco, California.

IRA A. CAMPBELL, Esq., Proctor for Libelant,

Merchants Exchange Building, San Fran-
cisco, California.

2 *Fireman's Fund Insurance Company vs.*

RICHARD A. BALLINGER, Esq., Proctor for
Libelant,

901 Alaska Building, Seattle, Washington.

ALFRED BATTLE, Esq., Proctor for Libelant,

901 Alaska Building, Seattle, Washington.

R. A. HULBERT, Esq., Proctor for Libelant,

901 Alaska Building, Seattle, Washington.

BRUCE C. SHORT, Esq., Proctor for Libelant,

901 Alaska Building, Seattle, Washington.

H. R. CLISE, Esq., Proctor for Respondent,

405-409 New York Building, Seattle, Wash-
ington. [1*]

C. K. POE, Esq., Proctor for Respondent,

405-409 New York Building, Seattle,
Washington. [2]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

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vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent.

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),

Substituted Respondent.

*Page-number appearing at foot of page of Certified Apostles on
Appeal.

Statement.

Time of commencement of suit: July 2, 1913.

Names of parties: Fireman's Fund Insurance Company, a corporation, libelant.

Globe Navigation Company, a corporation, respondent.

S. P. Weston (Trustee in Bankruptcy of the Globe Navigation Company, a bankrupt), substituted respondent.

Dates when pleadings were filed: Libel, July 2, 1913. Answer, October 1, 1914.

Issuance of process and service thereon: On July 2, 1913. Citation *in personam* was issued against The Globe Navigation Company, a corporation, and same was delivered to Marshal for service. On the 15th day of July, 1913, the Marshal returned said Citation into the Clerk's office with return indorsed thereon showing service upon the manager of above respondent. [3]

Reference to Commissioner: Cause was referred to Commissioner A. C. Bowman, by oral stipulation between proctors for libelant and respondent, said stipulation being entered into August 30, 1913. The Commissioner duly returned into the Clerk's office his transcript of the testimony so taken, together with the exhibits offered in evidence before said Commissioner.

Time of trial: This cause was submitted to the Honorable Jeremiah Neterer, Judge of the District Court, after argument, on depositions and testimony taken before A. C. Bowman, U. S. Commissioner.

4 *Fireman's Fund Insurance Company vs.*

Memorandum Decision was handed down and filed April, 8, 1915.

Date of entry of decree: Decree was made and entered and filed in said District Court April 21, 1915, and Notice of Appeal served and filed April 30, 1915. Assignment of Errors filed May 29, 1915. [4]

*In the United States District Court for the Western
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent.

Libel in Personam.

To the Honorable Judges of the Above-Entitled
Court:

The libel of the Fireman's Fund Insurance Company, a corporation, against The Globe Navigation Company, a corporation, in a cause of contract, civil and maritime, alleges as follows:

I.

That libelant is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of San Francisco, said State.

II.

That the American schooner "Wm. Nottingham,"

was, during all times hereinafter mentioned, owned by respondent, and A. M. Svenson was, during all of said times, the master of said vessel and agent of respondent in the execution of the instrument of indebtedness and in the receipt of the advance against freight, hereinafter mentioned. [5]

III.

That heretofore, on or about the 27th day of September, 1911, for valuable consideration, W. R. Grace & Co. became the owner and holder of the following instrument of indebtedness, to wit:

£1650—o/o Stg.

Seattle, Sept. 27, 1911.

At sight after the arrival of the American schooner "Wm. Nottingham," under my command, at the port of Callao, or any other place at which her voyage may terminate, I PROMISE TO PAY to the order of W. R. Grace & Co. the sum of sixteen hundred fifty pounds (£1650—o/o) British Sterling or approved Banker's Demand Bills on London, for freight advance received at Seattle, Wash., as per receipt given, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of the obligation, all my lien and claim against freight, vessel and owners, with power to take in my name any and all steps necessary to enforce the same; and my consignees at port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel. In case of nonpayment, the holder shall also be entitled to the benefit of all liens in law, equity or admiralty which the master or owner of the vessel may be entitled to against any

part of the cargo or its owners for freight, or any other charges whatsoever.

This claim is to have priority of payment over all others that may be presented against the said freight and vessel.

My vessel is now lying at the port of Astoria, Oreg., loaded with cargo Oregon pine and ready to sail for Callao, Peru. [6]

Signed in triplicate, one being accomplished, the others to stand void.

A. M. SVENSON,

Master Am. Schr. "Wm. Nottingham."

IV.

That thereafter, on or about the 2d day of October, 1911, said schooner "Wm. Nottingham" sailed from the port of Westport, Oregon, for the port of Callao, Peru, with a full cargo of lumber, and, subsequently on said voyage encountered storms at sea which so damaged said vessel as to cause the same to become water-logged and dismasted, and was abandoned at sea by her master, officers and crew; that, subsequently, said schooner was picked up by the tug "Wallula" and towed to the port of Astoria, Oregon, where, together with her cargo, she was libeled for salvage by the owner of said tug and its master, officers and crew; that thereafter, subsequent to the 27th day of November, 1911, said schooner, with her cargo, was towed to the port of St. Johns, Oregon, where her cargo was discharged, and said vessel was docked in order that a survey of the damages suffered by her might be made; that following said discharge of cargo and survey of said vessel,

respondent terminated her voyage at said port of St. Johns, and there delivered said cargo into the possession of the owner thereof.

V.

That by reason of the termination of said voyage at said port of St. Johns, said sum of Sixteen Hundred Fifty Pounds Sterling (£1650—0/0) became due and payable unto said W. R. Grace & Co. [7]

VI.

That on the 14th day of February, 1912, for valuable consideration, W. R. Grace & Co. assigned unto libelant all of its right, title and interest in and to its claim for the repayment of said sum of £1650, and libelant thereby became, and is now, the owner and holder of said claim and of said lien; that demand for payment of said indebtedness of £1650 has been made by said libelant upon respondent, but payment thereof has been, and is now, refused, and the amount thereof, to wit, eight thousand and thirty-two and 20/100 (8,032.20) dollars, still remains unpaid, and is now due and owing libelant by respondent.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that a monition, according to the course of this honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said respondent, and that it may be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Hon-

orable Court would be pleased to decree the payment of said sum of eight thousand and thirty-two and 20/100 (8,032.20) dollars, with interest and costs, and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

BRUCE C. SHORTS,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Libelant. [8]

United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says:

That he is the duly appointed General Agent of the Fireman's Fund Insurance Company, a corporation, libelant herein, and, as such, makes this verification for and on behalf of said corporation; that he has read the foregoing libel, knows the contents thereof, and believes the same to be true.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 27th day of June, 1913.

[Seal] W. R. COLBY, Jr.,
Notary Public in and for the County of King, State
of Washington.

[Indorsed]: Libel *in Personam*. Filed in the U. S. District Court, Western Dist. of Washington. July 2, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [9]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

THE GLOBE NAVIGATION COMPANY, a Cor-
poration,

Respondent.

Answer.

To the Honorable Judges of the Above-entitled
Court:

The Respondent, the Globe Navigation Company,
answering the libel of the Fireman's Fund Insur-
ance Company in the above-entitled cause, says:

I.

It admits the allegations contained in paragraph
one of said libel.

II.

It admits that during all the times mentioned in
the libel, the respondent was the owner of the
schooner "Wm. Nottingham," and that during said
time A. W. Svenson was the master thereof; and
denies that at any time said Svenson was the agent
of respondent in the execution of the instrument de-
scribed in paragraph three of said libel and denies
that said Svenson ever received the advance against
freight mentioned in said libel.

III.

It admits that A. W. Svenson signed the instrument set [10] forth in paragraph three of the libel, and denies that W. R. Grace & Co. became the owner and holder of said instrument for a valuable consideration, or at all, and this respondent alleges that the sum of money mentioned and described in said instrument was due and owing from said W. R. Grace & Co. in pursuance of and under terms of a certain charter-party made and executed by said respondent and by said W. R. Grace & Co., at Seattle, Washington, on the 3d day of June, 1911, and paid by said W. R. Grace & Co. to this respondent only in accordance with the terms of said charter party and not otherwise.

IV.

This respondent admits that on or about the 2d day of October, 1911, said schooner "Wm. Nottingham" sailed from the port of Westport, Oregon, for the port of Callao, Peru, with a full cargo of lumber, and subsequently on said voyage encountered storms at sea which so damaged said vessel as to cause the same to become water-logged and dismasted, and was abandoned at sea by her master, officers and crew; that subsequently said schooner was picked up by the tug "Wallula" and towed to the port of Astoria, Oregon, where, together with her cargo, she was libeled for salvage by the owner of said tug and its master, officers, and crew; and except as may appear by the allegations hereinafter made in this paragraph, denies each and every other allegation in said paragraph contained. Respondent alleges

that said schooner with its cargo on board, immediately after its arrival at Astoria, Oregon, was abandoned by this respondent to this libelant, and that since that time this respondent has never exercised any exclusive acts of ownership over said wrecked schooner and its cargo, and that it has at all times maintained and insisted upon its said abandonment to libelant. Respondent further alleges that while said schooner with her cargo on board under the libel [11] hereinbefore referred to was in the possession of the United States Marshal of the District of Oregon with the consent of libelant, respondent and all parties in interest, said schooner with her cargo was towed under the control and direction of said Marshal to St. Johns, Oregon, where said cargo, while the same was still in the possession and control of said Marshal, was discharged on a dock at said St. Johns, and was there taken possession of by this libelant without any action by or consent whatsoever of this respondent.

V.

It denies each and every allegation contained in paragraph five of said libel.

VI.

Respondent denies that it has any knowledge as to whether on the 14th day of February, 1912, or at any other time, for a valuable consideration, or at all, that said W. R. Grace & Co. assigned unto libelant all of its right, title and interest in and to the instrument described in paragraph four of said libel, and denies that it has any knowledge as to whether the said libelant is now the owner and holder of said

claim, and therefore, asks strict proof of the same. Respondent admits that libelant has demanded of it the payment of the sum of eight thousand thirty-two dollars and twenty cents (\$8,032.20), and that it refused to pay the same, and denies that said sum or anything is due from this respondent to said libelant.

VII.

The respondent denies each and every allegation contained in paragraph seven of said libel.

VIII.

Further answering the libel herein this respondent alleges that during all the times hereinafter mentioned, Seattle [12] was the principal place of business of this respondent in the State of Washington, and that Seattle was the home port of said schooner "Wm. Nottingham"; that at Seattle, Washington, on June 3, 1911, the respondent entered into a written charter-party with W. R. Grace & Co., to transport a cargo of lumber from the Columbia River to Calloa, Peru, for a consideration therein agreed upon, and as a part of the consideration therefor it was agreed that one-third of the freight would be advanced and paid by charters on account of the freight under said charter-party subject to a charge of seven per cent to cover interest, insurance and commission; that when said schooner was fully laden and ready for sea, said W. R. Grace & Co., advanced to this respondent the sum of sixteen hundred fifty pounds British sterling, and said W. R. Grace & Co., thereupon under the terms of said charter-party insured the same and charged the

cost or premium therefor to this respondent, and respondent paid the same by allowing said W. R. Grace & Co. to deduct the same from one-third of the freight due under said charter-party, said sum of sixteen hundred fifty pounds British sterling, being said one-third of freight less said deduction of seven per cent as provided in said policy for insurance charges and interest.

IX.

Respondent further alleges said W. R. Grace & Co. in its own name, but actually as the agent for and for the use and benefit of this respondent, insured said advance of freight with the libelant herein, and paid to said libelant the premium demanded by it for said insurance, all, however, at the cost and expense and for the benefit of this respondent, but said W. R. Grace & Co., by reason of said advance of freight to this respondent and by the subsequent loss and abandonment of said schooner suffered no loss whatsoever; that said libelant at all times knew of said charter-party [13] hereinbefore referred to and its terms and conditions, and knew when it issued its policy of insurance to said W. R. Grace & Co., that the same was for the use and protection of this respondent, and was to hold this respondent harmless in case said respondent suffered any loss by reason of said voyage.

X.

Respondent alleges that there was no valuable or any consideration, whatsoever, passing between said Grace & Co. and this respondent for or on account of the instrument sued on by libelant herein, but the

consideration for the payment of the sum of money mentioned in said instrument was based wholly upon said charter-party and the performance of the conditions of said charter-party by this respondent.

XI.

Respondent further alleges that on said 27th day of September, 1911, the master of said schooner "William Nottingham" delivered to said W. R. Grace & Co., a certain bill of lading for the cargo shipped on board said schooner, wherein and whereby it was provided that said Grace & Co. should effect insurance on account of said sixteen hundred fifty pounds British sterling advanced on freight at the cost and expense of this respondent and for its protection, the delivery of said bill of lading and payment of said advance on freight and insurance thereon, all being cotemporaneous acts.

WHEREFORE, This respondent prays that this action may be dismissed and that it recover its costs therein and may have such other and further relief as in all justice it may be entitled to receive.

CLISE & POE,

Attorneys for Respondent, Globe Navigation Company. [14]

United States of America,
State of Washington,
County of King,—ss.

George F. Thorndyke, being duly sworn, on oath deposes and says: That he is the manager of the respondent, Globe Navigation Company, and as such makes this verification for and on behalf of said corporation; that he has read the foregoing answer,

knows the contents thereof, and believes the same to be true.

GEORGE F. THORNDYKE.

Subscribed and sworn to before me this 17th day of September, 1913.

H. R. CLISE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 1, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy. [15]

*In the District Court of the United States, for the
Western District of Washington, Northern Division.*

FIREMAN'S FUND INSURANCE COMPANY,
Libelant,

vs.

GLOBE NAVIGATION COMPANY,

Respondent.

Wednesday, Nov. 12th.

Thursday, Nov. 13th.

Reporter's Transcript.

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CHARLES R. GAGAN,

EDWARD W. LEHNER,

Official Reporters, 329 P. O. Building. [16]

*In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.*

FIREMAN'S FUND INSURANCE COMPANY,

Libelant,

vs.

GLOBE NAVIGATION COMPANY,

Respondent.

BE IT REMEMBERED that on Wednesday, No-
vember 12th, and Thursday, November, 13th, 1913,
pursuant to the stipulation hereunto annexed, at the
offices of Messrs. McCutchen, Olney & Willard, in
the Merchants Exchange Building, in the City and
County of San Francisco, State of California, per-
sonally appeared before me, FRANCIS KRULL, a
United States Commissioner for the Northern Dis-
trict of California, duly commissioned to take ac-

knowledgments of bail and affidavits, etc., Charles R. Page, a witness on behalf of the Libelant, and A. W. Follansbee, Jr., E. T. Ford and George F. Thorndyke, witnesses on behalf of the Respondent.

IRA A. CAMPBELL, Esq., appeared as proctor for the Libelant, and H. R. CLISE, Esq., appeared as proctor for the Respondent, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth. [17]

(It is hereby stipulated and agreed by and between the proctors for the respective parties, that the deposition of Charles R. Page may be taken on behalf of the Libelant, and that the depositions of A. W. Follansbee, Jr., E. T. Ford and George F. Thorndyke may be taken on behalf of the Respondent, at the offices of Messrs. McCutchen, Olney & Willard, in the Merchants Exchange Building, in the City and County of San Francisco, State of California, on Wednesday, November 12th and Thursday, November 13th, 1913, before FRANCIS KRULL, United States Commissioner for the Northern District of California, and in shorthand by HERBERT BENNETT.

It is further stipulated that the depositions when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as

to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.) [18]

[Deposition of Charles R. Page, for Libelant.]

CHARLES R. PAGE, called for the libelant, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. Charles R. Page.

Q. What business are you engaged in?

A. Marine insurance.

Q. Are you connected with any insurance company? A. Fireman's Fund Insurance Company.

Q. In what capacity?

A. I am in charge of the marine loss department.

Q. Does that include the supervision of payment of losses? A. It does.

Q. Do you know whether the Fireman's Fund Insurance Company insured W. R. Grace & Company on account of advances made by W. R. Grace & Company to the master of the schooner "William Nottingham" on the voyage in which she was dismasted off Columbia River in the early part of November, 1911, or not? A. They did.

Q. I will hand you a document and ask you what it is?

A. It is the original certificate of insurance issued by the Fireman's Fund Insurance Company covering the advances in question.

Q. Will you state whether or not that is a contract of insurance? A. It is.

(Deposition of Charles R. Page.)

Q. Was any other contract of insurance issued than that one? A. Not on the risk in question.

Q. Did the Fireman's Fund Insurance Company ever pay a loss to W. R. Grace & Company under that certificate of insurance? A. They did.

Q. Do you know in what amount?

A. I cannot state positively from recollection other than it is the best of my recollection [19] that it was a total loss of \$7,920.00, the full amount of the certificate.

Q. Upon payment of that loss did you receive any document from W. R. Grace & Company?

A. Yes, sir, we demanded the surrender of the original certificate of insurance; the charter-party, if I am not mistaken, and copy of the bill of lading, the original of the master's advance note and signature to a form of subrogation which we presented to them.

Q. You say that the original certificate of insurance was surrendered. I hand you a document and ask you whether or not that is the certificate to which you refer? A. That is the one in question.

Q. Does it bear W. R. Grace & Company's endorsement?

A. Duly endorsed by W. R. Grace & Company by its submanagers Mr. Carter and Mr. Upward.

Mr. CAMPBELL.—I offer that in evidence and ask that it be marked Libellant's Exhibit "1."

(The document is marked Libellant's Exhibit "1.")

Q. I hand you another document and ask you what that is?

(Deposition of Charles R. Page.)

A. That is one of the original drafts signed by the master of the American schooner "William Nottingham" covering the advances which were insured under this policy.

Q. I hand you another document and ask you what that is?

A. That is an agreement on the part of W. R. Grace & Company which was given to us at the time of the payment of the loss undertaking to procure for us the original draft covering the advances made to the master of the "Nottingham."

Mr. CAMPBELL.—I offer that in evidence and ask that it be marked Libelant's Exhibit "2."

(The document is marked Libelant's Exhibit "2.") [20]

Q. Was that document surrendered to you by W. R. Grace & Company at the time of your payment on the loss of the certificate of insurance?

A. I cannot state positively. I have a recollection that that was subsequently obtained by us. In the interval they gave us an undertaking to get it for us.

Q. Now, I hand you the draft which you have just been testifying to and ask you whether or not that is the original draft which was subsequently surrendered to you by W. R. Grace & Company pursuant to the agreement which has just been offered in evidence and marked Libelant's Exhibit "2"?

A. Yes, sir.

Q. Does it bear W. R. Grace & Company's endorsement on the back?

(Deposition of Charles R. Page.)

A. Yes, sir, by its submanagers Mr. Carter and Mr. Upward.

Mr. CAMPBELL.—I offer that document in evidence and ask that it be marked Libelant's Exhibit #.

(The document is marked Libelant's Exhibit "3.")

Q. I hand you another document and ask you what it is and from whence it was obtained?

A. This document was obtained by us from W. R. Grace & Company, I believe, and is a duplicate receipt acknowledging the receipt of advances from W. R. Grace & Company signed by the Globe Navigation Company, Limited, G. C. Thomas.

Q. When was that obtained with respect to the time of payment of the insurance?

A. That I cannot state.

Mr. CAMPBELL.—I offer that document in evidence and ask that it be marked Libelant's Exhibit "4."

(The document is marked Libelant's Exhibit "4.")

Q. I hand you another document and ask you what it is? [21]

A. It is the company's usual form of subrogation taken upon the payment of a loss under the receipt covering the advances to W. R. Grace & Company on the 14th of February, 1912.

Q. By whom is it signed?

A. W. R. Grace & Company by Mr. Carter, the submanager.

(Deposition of Charles R. Page.)

Mr. CAMPBELL.—I offer that document in evidence and ask that it be marked Libelant's Exhibit "5."

(The document is marked Libelant's Exhibit "5.")

(It is stipulated that following the trouble which the "Nottingham" got into off Columbia River in the early part of October, 1911, a notice of abandonment of the vessel as for a constructive total loss was served by the owner of the vessel, the Globe Navigation Company, upon its underwriters covering on the vessel, after the vessel was towed into the Port of Astoria, and subsequently the voyage of the vessel on which she got into trouble was abandoned, following the discharge of her cargo at St. Johns.)

Cross-examination.

Mr. CLISE.—Q. Mr. Page, did you know anything about this insurance prior to the time that a claim was made on account of the loss?

A. Yes, sir.

Q. What did you know prior to that time?

A. I knew we made the covering advances of W. R. Grace & Company.

Q. When did you know that?

A. I could not tell positively, Mr. Clise, but probably at the time that the vessel first got into trouble. It is my custom to look up vessels which are in trouble and ascertain our interest.

Q. You did not know anything at the time the policies were written?

A. I have no recollection in regard to that.

(Deposition of Charles R. Page.)

Q. When W. R. Grace & Company surrendered to you the papers [22] which have already been introduced in evidence, did they surrender to you the charter-party on which the advances had been made?

A. They surrendered a copy of the charter-party, a certified copy.

Q. Is the paper which I hand you the charter-party which was surrendered to you by W. R. Grace & Company at that time? A. That is the one.

Mr. CLISE.—I will offer it in evidence, and ask that it be marked Respondent's Exhibit "A."

(The paper is marked, Respondent's Exhibit "A.")

Q. Referring to Libelant's Exhibit "1," this is not a policy of insurance?

A. It is known in the insurance business as a certificate of insurance.

Q. And it appears to be subject to the conditions of the usual form of English cargo policy as issued by the Fireman's Fund Insurance Company?

A. It is, yes.

Q. Have you got one of the usual forms of the English cargo policies as issued by your company?

A. Yes, sir.

Q. Is the paper which I hand you such a form?

A. Yes, sir.

Mr. CLISE.—I will offer it in evidence as Respondent's Exhibit "B."

(The paper is marked Respondent's Exhibit "B.")

24 *Fireman's Fund Insurance Company vs.*

(Deposition of Charles R. Page.)

Q. The insurance referred to in "Libelant's Exhibit "1" had been brought to the attention of your company, prior to the issuance of this certificate, had it not? A. Yes, sir.

Q. And in what manner?

A. It was offered to us by a broker on behalf of W. R. Grace & Company.

Q. Is the paper I hand you the offer that was made by your company?

A. That is not the offer. It is what is technically known as an open cover issued to that broker after [23] his offer had been made.

Q. Have you in your possession the offer as made by the broker?

A. Those offers are generally verbal.

Q. In response to the verbal offer this is the document that is issued by your company then, is it?

A. It is after the terms and rates are agreed.

Mr. CLISE.—I will offer the same in evidence as Respondent's Exhibit "C."

(The paper is marked Respondent's Exhibit "C.")

Mr. CAMPBELL.—Q. Is that issued by your company, or was that prepared by the broker and accepted by your company?

A. That particular one was evidently prepared by the broker and brought in after the deal was consummated and signed by us, and one copy taken away by him. I did not happen to notice that that was on the broker's form. The usual course of business is for us to issue the document and have a memorandum

(Deposition of Charles R. Page.)

form written out and signed and handed to the broker.

Mr. CLISE.—Q. It is immaterial whether it was issued by you or the broker; this embodied the preliminary agreement? A. It did.

Q. Then, after the amount of the advance is definitely known is another paper issued?

A. After the amount of the advance is definitely known, it is the custom of the broker to bring in what is known as a closing application to the company, asking for the issuance of a policy for the amount stated in that application.

Q. And was such an application made to you in this case? A. Yes, sir, it was.

Q. Is the paper I hand you that application?

A. That is the original application. [24]

Mr. CLISE.—I offer that in evidence as Respondent's Exhibit "D."

(The paper is marked Respondent's Exhibit "D.")

[Deposition of A. W. Follansbee, Jr., for Respondent.]

A. W. FOLLANSBEE, Jr., called for the respondent, sworn.

Mr. CLISE.—Q. What is your name?

A. A. W. Follansbee.

Q. What is your business?

A. Marine Secretary of the Fireman's Fund Insurance Company.

Q. How long have you held that position?

A. I think since January, 1911.

(Deposition of A. W. Follansbee, Jr.)

Q. You occupied that position at the time this paper known as Libelant's Exhibit "1" was executed? A. Yes, sir.

Q. And at the time Respondent's Exhibit "C" was executed? A. Yes, sir.

Q. I understand that you were the officer of the Fireman's Fund Insurance Company that negotiated this insurance? A. Yes, sir.

Q. And you were the officer with whom Bates & Chesebrough acted in this matter? A. I was, yes.

Q. Bates, Chesebrough & Lowery?

A. Bates, Chesebrough & Lowery were acting in the capacity of brokers for W. R. Grace & Company.

Q. At the time they made the verbal application as subsequently evidenced by Respondent's Exhibits "C" and "D" did they acquaint you with the contents of a certain charter-party entered into between the Globe Navigation Company and W. R. Grace & Company as evidenced by Respondent's Exhibit "A"? A. They did not, no.

Q. Did you make any inquiries as to the contents of this [25] charter-party as shown by Respondent's Exhibit "A"? A. I did not, no.

Q. You knew that this was an advance on freight that you were insuring against, didn't you?

A. I did not know it was an advance on freight or an advance against the captain's draft. There is a little difference between the two.

Q. You did not know which it was?

A. They did not disclose that. I do not remember inquiring whether it was an advance against freight

(Deposition of A. W. Follanshee, Jr.)

or an advance against the captain's draft.

Q. When was Libelant's Exhibit "1" issued by the company?

A. Will you let me explain something first? It is customary in this business to first come in and take a covering note first, before they know what the amount is and later on when they know what it is, it is declared. I suppose this is the date of original acceptance and this is the date it was declared to us. It might have been months difference.

Q. It might not have been issued until October?

A. Here is the date, June 5th, 1911.

Q. That was simply in the event that later an advance was actually made? A. Yes, sir.

Q. If no advance is actually made then, no contract is entered into?

A. No contract entered into.

Q. After the advance was made then, they came in and told you the exact amount of the advance and you then issued this? A. Yes, sir, that is correct.

(An adjournment is here taken until to-morrow, Thursday, November 13th, 1913, at 10 o'clock A. M.)

[26]

[Deposition of E. T. Ford, for Respondent.]

Thursday, November 13th, 1913.

E. T. FORD, called for the respondent, sworn.

Mr. CLISE.—Q. Mr. Ford, please state your name and occupation.

A. Edward T. Ford; submanager W. R. Grace & Company.

Q. In June, 1911, where were you stationed?

(Deposition of E. T. Ford.)

A. I was stationed in Seattle as the agent for W. R. Grace & Company.

Q. I show you Respondent's Exhibit "A," which is the charter-party between the Globe Navigation Company and yourself and ask you if you are the E. T. Ford who executed that document on behalf of W. R. Grace & Company? A. I am.

Q. Now, that charter-party contains a clause reading: "A sufficient amount for ship's ordinary disbursements at port of loading, say not exceeding one third of the freight to be advanced by charterers if required by captain on account of freight under this Charter Party, subject to a charge of seven per cent to cover interest, insurance and commission; advance to be endorsed on Captain's copy of Charter Party and all the Bills of Lading." Did you insure this advance? A. Yes, sir, we insured it.

Q. With whom?

A. We insured through our brokers, Bates, Chesebrough & Lowery.

Q. Do you know with what company they placed it?

A. I believe they placed it with the Fireman's Fund Insurance Company.

Q. To whom did you charge the cost of this insurance?

A. We charged the cost of that insurance to the Globe Navigation Company. [27]

Q. In placing this insurance, for whom did you understand you were acting?

Mr. CAMPBELL.—We object to the question as

(Deposition of E. T. Ford.)

calling for the conclusion of the witness; the document on which the advances were made and other documents offered in evidence speak for themselves and are the best evidence.

Mr. CLISE.—I want to change the question.

Q. In placing this insurance for whom were you acting?

Mr. CAMPBELL.—We object to the question for the reason it calls for the conclusion of the witness and upon the further ground that the advances were evidenced by written documents which constitute the best evidence.

A. We were acting for the Globe Navigation Company to whom we charged and collected the amount of the premium.

Q. What do you mean by saying that you were acting for the Globe Navigation Company?

A. We chartered this vessel and agreed to pay a certain amount of freight for her; at the same time we agreed to make a certain amount of advance against the freight, which we did. The advance we insured, and, in so doing, we practically stepped into the position of the Globe Navigation Company in insuring our own freight with the understanding that if they insured the freight, they would not insure more than the balance over the amount of this advance.

Q. Now, Mr. Ford, what you did was this, was it not: You made a certain advance to the Globe Navigation Company?

A. Yes, sir, we made an advance against freight.

(Deposition of E. T. Ford.)

Q. And you insured this money advance which you made? A. Yes, sir.

Q. Wherein did the Globe Navigation Company have any insurable [28] interest in that advance?

A. We charged the insurance to them.

Q. I assume that.

A. Probably if we had not insured her they would have.

Q. Wherein did the Globe Navigation Company have any further interest in that advance so as to have an insurable interest in it?

A. Where did they have any further interest in it?

Q. Where did they have any insurable interest in that advance?

A. Of course, the usual way they would come is—the usual course is for owners to insure freight; this was practically part of the freight. This was an advance of this freight if we insured this part of it and charged them up with insurance, they, in placing their insurance, would not cover this, but would only cover the balance of the freight.

Q. I grant that. If they insured their freight they would insure the difference between the total amount of the freight and this advance?

A. Yes, sir.

Q. But the money you collected from the insurance company on the policies covering this advance was obtained by W. R. Grace & Company?

A. Yes, sir.

Q. Wherein would the Globe Navigation Company have any insurable interest in this advance which you

(Deposition of E. T. Ford.)

say that you insured for their company?

A. Let me see. I think they—after paying the premium they probably would have no further interest.

Q. All the interest they had was whatever flowed from the fact that you charged the premium to them under your charter-party terms?

A. Yes, sir, they had no further interest—they had no further connection with the interest, regardless if [29] there was a loss, we never would have looked to the Globe Navigation Company to pay it. The only place where there would be any further interest in the advance, was, if the vessel had earned her freight, then this amount of advance would have been deducted.

Q. You would have collected your draft?

A. We would have collected our draft.

Q. That is to say, that whenever under the terms of the draft the amount was repayable to you, you would have collected that from the Globe Navigation Company under the terms of the draft. Whenever the amount that was advanced under the draft became due under the terms of the draft, you would make a collection?

A. Of course, the charter provided that the freight was to be paid in a certain amount. On a settlement of the freight, the amount of the draft would have been deducted.

Q. My question is whatever the amount advanced when the draft became due by the terms of the draft, you expected to collect payment of it?

(Deposition of E. T. Ford.)

A. No, sir, we expected to deduct it from the freight.

Q. You expected to collect your draft?

A. By deducting from the freight.

Q. That was the fact, whenever that became due under the draft you expected to collect payment?

A. Yes, sir.

Q. That is really what you were doing, you were really collecting payment of that draft. You could have negotiated the draft?

A. Yes, sir, I think we could have.

Q. After making claim upon the underwriters and collecting that amount of insurance you did not pay any portion to the Globe Navigation Company?

A. None whatever. [30]

Mr. CLISE.—Q. By your answer to these last questions of Mr. Campbell, are you basing the same upon your understanding that the contract between W. R. Grace & Company and the Globe Navigation Company was based upon the charter-party and that the terms of the draft did not in any wise, alter the original agreement that was entered into between them?

Mr. CAMPBELL.—I object to the question on the ground that it calls for the conclusion of the witness, and that the documents are the best evidence.

A. The whole basis of our transaction was on the charter-party. It was with no intent whatever of changing the terms that the draft was worded as it was. There was no intention on our part of changing the terms of the charter-party at any stage of the proposition.

(Deposition of E. T. Ford.)

Mr. CLISE.—Q. In effect, your understanding is the draft was a mere receipt for advances on freight?

Mr. CAMPBELL.—I object to the question as calling for the conclusion of the witness and on the further ground the documents are the best evidence of the transaction.

Mr. CLISE.—Q. You were not claiming a bottomry bond or any loss as against the vessel, or as a claim against the Globe Navigation Company, by reason of making that advance?

Mr. CAMPBELL.—The same objection.

A. None whatever.

Mr. CAMPBELL.—Q. Did you take other drafts of this same character from the Globe Navigation Company at previous times?

A. We took a great number of them.

Mr. CLISE.—Q. Are you making that answer from an examination of your files, or just off-hand? In other words, if Mr. Thorndyke has testified you made only one other draft [31] similar to this, would you think Mr. Thorndyke was more apt to be correct than yourself?

A. The drafts which I made were with the captain as representative of the Globe Navigation Company.

Q. A close examination of the drafts made by Mr. Thorndyke at Seattle reveals only one other draft similar to this. There were a great many other drafts but the terms were not similar to this. I do not want to make a broad statement because that would compel us to go further into it.

(Deposition of E. T. Ford.)

A. You say there were a great many other drafts, but the terms were not similar to this?

Mr. CAMPBELL.—Q. You have personal knowledge of the fact of taking other drafts of the master of his vessel? A. I have, yes.

Q. You say that this is the kind of a draft that you always used?

A. That is our usual form of draft. I made our first transaction with the Globe Navigation Company and established the routine by which this business was done.

Q. Did you ever make advances without taking drafts? A. No, sir.

Mr. CLISE.—Q. Referring to this Respondent's Exhibit "A," which was the charter-party, is that the standard form of W. R. Grace & Company?

A. It is.

Q. Do you know how long this form of charter-party has been in existence?

A. To my personal knowledge it has been in existence for in excess of nine years.

Q. Is this same form of charter-party used all up and down the coast?

Mr. CAMPBELL.—That is by W. R. Grace & Company?

Mr. CLISE.—Q. Yes, by W. R. Grace & Company. [32] A. It is.

Q. It is the regular form which you use here in San Francisco? A. It is our regular form, yes.

Q. How extensive is the business of W. R. Grace & Company here in San Francisco?

(Deposition of E. T. Ford.)

A. You mean with respect to charters of this kind?

Q. With respect to charters, yes.

A. We charter approximately from 25 to 40 vessels a year on that form of charter.

Q. It appears from the evidence, that when the captain of the "Nottingham" applied to your office in Seattle for the advance against freight under the clause which I have just read, that a certain form of receipt was given to him which is known as Libelant's Exhibit "3." Will you please examine that and state whether or not that, when an advance is made under a charter similar to the one in evidence in this case, does your company make it a condition that he shall sign that particular form of draft.

Mr. CAMPBELL.—We object to the question as being incompetent, irrelevant and immaterial for the reason that advances in this particular case were under the written documents or drafts which constitute the best evidence of the contract—of the transaction.

A. We require the captain to sign this form of draft prior to making any advance.

Mr. CLISE.—Q. Does your company permit any alterations or changes in this form of draft which the captain has to sign? A. We permit no changes.

Q. In demanding this form of receipt for the moneys which are advanced under the charter-party, is it the understanding of your company thereby the terms of the charter-party are in [33] any ways varied or changed?

Mr. CAMPBELL.—I object to the question as

(Deposition of E. T. Ford.)

calling for the conclusion of the witness and upon the further ground the documents are the best evidence and speak for themselves as to the transaction.

A. We do not consider that this draft in any way changes the form, nor is it our intention that it should change the form of the charter.

Mr. CAMPBELL.—We move to strike out the answer of the witness for the reason it is a conclusion of the witness and it is not the best evidence.

Mr. CLISE.—Q. When this money is advanced to the owner does your company consider that or understand that it has any claim as against the owner for the return of this money in case of any disasters to the ship. In other words, do you consider it as loss to the owner?

Mr. CAMPBELL.—We object to the question as calling for the conclusion of the witness and upon the further ground that the drafts and documents are the best evidence and speak for themselves as to the contract.

A. We consider it merely as an advance against the freight.

Mr. CLISE.—Q. When the disaster occurred to the "Nottingham," did you ever ask for the return of this money from the Globe Navigation Company?

A. No, sir.

Q. Did your company consider that it had any claim against the Globe Navigation Company for the return of this money by reason of the disaster to the "Nottingham" under this draft, as shown by Libel-

(Deposition of E. T. Ford.)

ant's Exhibit "3"?

Mr. CAMPBELL.—We object to the question as calling for the conclusion of the witness and upon the further ground [34] that the documents speak for themselves as to the contract between the parties and constitute the best evidence.

A. We merely consider this as an advance against freight and an item to be deducted from the freight on settlement.

Mr. CLISE.—Q. Was there any consideration for the payment of the sum of money evidenced by this contract other than the terms of the charter-party?

Mr. CAMPBELL.—We object to the question on the ground that the documents speak for themselves and are the best evidence of the contract of the transaction.

A. There was no other consideration outside of the terms stated in the charter.

Mr. CLISE.—Q. Do you usually insure an advance against freight? A. We do.

Q. At whose expense is this insurance taken?

A. At the expense of the owners.

Q. Are the terms of this printed policy of yours well known among shipping men on the coast?

Mr. CAMPBELL.—We object to the question as calling for the conclusion of the witness; the witness not being qualified to testify to the knowledge of other shipping men.

A. Is that printed form of charter-party known?

Mr. CLISE.—Q. Yes, well known along this coast?

(Deposition of E. T. Ford.)

A. It is well known, yes.

Mr. CAMPBELL.—I object to the modified question and move to strike out the answer on the ground it is the conclusion of the witness, the witness not having been qualified to testify as to the knowledge of shipping men generally along the coast. [35]

Mr. CLISE.—Q. How long have you been on this coast?

A. How long have I been on this coast?

Q. Yes. A. 33 years.

Q. How long have you been with W. R. Grace & Company?

A. I have been with W. R. Grace & Company about 9 years.

Q. What business were you engaged in prior to that time?

A. I was with the Joshua Hendy Machine Works.

Cross-examination.

Mr. CAMPBELL.—Q. Are you using that form of draft now on advances? A. We are.

Q. Was it not modified after this disaster?

A. No, sir.

Q. Are you sure about that? A. Positive.

Q. You know nothing about the placing of this insurance, do you, personally? A. No, sir.

Q. You were in Seattle at that time?

A. The exact date the insurance was placed I could not say where I was.

Q. When did you come to San Francisco?

A. About the time that insurance was placed, I think I was on my return from a trip to the west

(Deposition of E. T. Ford.)

coast of South America.

Q. When did you come to San Francisco as a sub-manager?

A. I came to San Francisco as submanager in September of last year.

Q. 1912? A. 1912.

Q. Prior to that time you were the agent at Seattle?

A. Prior to that time I was the agent at Seattle and prior to that I was in the San Francisco office.

Q. The placing of the insurance on the advances was handled by the San Francisco office?

A. Handled by the San Francisco office, yes.

Q. Your knowledge simply is knowledge which has been acquired [36] from these records, I presume.

A. Acquired from these and from our routine in the office prior to the time I left San Francisco.

Q. As to the method which you do business; as the manner in which you do business.

A. The manner we do business and handle a transaction of this kind. Of course, I have handled a number of transactions of this kind prior to leaving San Francisco.

Q. That is what I am getting at. It is not personal knowledge as to the handling of this particular transaction, but it is from your knowledge of the way W. R. Grace & Company handle that character of business.

A. Yes, sir, I did not have the personal knowledge of this transaction regarding where the insurance was placed.

(Deposition of E. T. Ford.)

Q. When the "Nottingham" got into trouble, you made your claim upon the underwriters for a payment of the loss under their policies covering advances; that is, your office here did? A. Yes, sir.

Q. You personally had nothing to do with that?

A. Nothing whatever.

Q. When you say you made no demand on the Globe Navigation Company, you mean that you personally made no demand on the Globe Navigation Company?

A. No, sir, I made no demand personally on the Globe Navigation Company.

Q. Do you recall having sent a copy of this draft to Mr. Thorndyke immediately after its execution with the master? A. I did not execute the draft.

Q. You were not there at that time? A. No, sir.

Q. Before whom was it executed?

A. It was executed by Mr. Carter. [37]

Q. The draft? A. The draft, yes.

Q. Was he in Seattle at that time?

A. He was in Seattle at the time.

Q. What was his position with W. R. Grace & Company?

A. He was acting agent in my place during my absence.

Q. Was it customary to send copies of these drafts to the owners upon execution by the master?

A. We always handed the master a copy; whether he turned it into his owners, or not, I do not know.

Q. Now, in all the drafts that W. R. Grace & Company took from the Globe Navigation Company for

(Deposition of E. T. Ford.)

advances under prior charters, they were the same character as this draft, I understand?

A. The same, yes.

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. CLISE.—Q. You do not mean that the Globe Navigation Company have executed these drafts; you mean that the captains of the various vessels have executed the drafts?

A. The captains of the various vessels have executed the drafts, yes.

Q. Now, your company never made any demand upon the Globe Navigation Company for the return of this money?

A. They made no demand on the Globe Navigation Company.

Mr. CAMPBELL.—We object to that as a conclusion. The witness said he had no personal knowledge of it.

Mr. CLISE.—Q. If any such demand had been made by your company, it would have been called to your attention?

A. Yes, sir.

Q. You have had personal knowledge of this entire transaction, have you not?

A. That is rather a difficult question [38] to answer, to say the entire transaction.

Q. Since this litigation commenced, the matter has been called to your attention?

A. It has been discussed very fully.

Q. You have advised yourself as to what action

(Deposition of E. T. Ford.)

your company has taken with regard to it?

A. I have.

Q. The testimony you have given here is understood to be not your personal action in any way, but as the representative of W. R. Grace & Company?

A. Yes, sir.

Recross-examination.

Mr. CAMPBELL.—Q. At the time this transaction took place you were on the west coast of South America?

A. I did not say I was on the west coast of South America; I said I believed I was on my return from the west coast of South America.

Q. When did you go down there?

A. I went down there in July.

Q. 1911? A. 1911, yes, sir.

Q. When did you get back?

A. I got back to Seattle on the—as close as I can remember the date it was the first of—let me see, it was during October.

Q. During October?

A. Yes, sir. If I remember correctly the accident to the “Nottingham” had occurred just prior to my arrival in San Francisco on my way home.

Q. As to what may have been done by your San Francisco office regarding the demand upon the Globe Navigation Company when you testified that there was no demand made, are you testifying to that as a conclusion on your part or because of your having been told by others in San Francisco that no demand was made?

(Deposition of E. T. Ford.)

A. Well, I returned about the time all these negotiations [39] were carried on; it was shortly after the accident, and there was considerable correspondence exchanged between my office and the San Francisco office with respect to the matter and between us, we fully discussed all the questions with respect to this and I have since discussed these various questions with Mr. Carter, who had the active management of this thing here and, of course, with respect to the placing of insurance against these advances, why I am guided by what our record shows in the office and what he has told me.

Q. It is knowledge that has come to you through somebody else?

A. Through the record and through my conversation with Mr. Carter.

Q. As to any demand having been made on the Globe Navigation Company outside of your personal knowledge when you purported to testify on behalf of the company if you had any knowledge it is what your informant told you?

A. I made no demand on the company and my conversation with others in the company who would make demands and in my conversation with those who would make demands I have been advised they made no such demand.

Mr. CAMPBELL.—I move to strike out his testimony upon what others told him as being hearsay.

Mr. CLISE.—If you are going to take that position I shall have to take Mr. Carter's testimony in Peru.

(Deposition of E. T. Ford.)

Mr. CAMPBELL.—Q. As a matter of fact, what took place was your people immediately make claim upon the underwriters to pay you under the policies for the advance, was not that it?

A. Yes, sir.

Q. The charge that you made for advancing this money to the master on the draft included interest at 7 per cent on the [40] money actually paid the master and the cost of insuring it and a commission charged for making advances?

A. The 7 per cent covered the interest, insurance and commission.

Q. You made a charge then of 7 per cent which was intended to cover interest on the actual amount of cash advanced? A. Yes, sir.

Q. And the cost of the insurance premiums to you and a commission to you for making the advance?

A. Yes, sir.

Mr. CAMPBELL.—That is all.

[Deposition of George F. Thorndyke, for Respondent.]

GEORGE F. THORNDYKE, called for the respondent, sworn.

Mr. CLISE.—Q. Mr. Thorndyke, are you an officer of the Globe Navigation Company?

A. I am manager of the Globe Navigation Company, yes.

Q. Where is the principal place of business of the Globe Navigation Company?

A. Seattle, Washington.

Q. Where was the "Nottingham" built?

(Deposition of George F. Thorndyke.)

A. Seattle, Washington.

Q. Where is its home port?

A. Seattle, Washington.

Q. You have already testified, Mr. Thorndyke, that Captain Swenson did not advise with you prior to the giving of this document known as Libelant's Exhibit "3"? Now, when was this form of draft first brought to your attention as shown by this Libelant's Exhibit "3"?

A. The first time I remember having seen that form of draft was when I was in Johnson & Higgins office in San Francisco after the disaster to the "Nottingham,"—not in Johnson & Higgins office but in W. R. [41] Grace & Company's office.

Q. Other than the one draft which you have testified was given to you on the schooner "J. W. Clise," has your company ever taken any other draft similar to this? A. Not to my knowledge.

Q. Was the draft on the schooner "J. W. Clise" executed in the same manner as this one on the "Nottingham"?

A. Yes, sir, I think it is the same, only signed by a different man, signed by a different master; signed by the master of the "Clise."

Q. You personally did not execute it?

A. I did not execute it, no. I saw it afterwards.

Q. Afterwards; when do you mean by that, prior or after the disaster to the "Nottingham"?

A. After the disaster to the "Nottingham."

Q. Has W. R. Grace & Company ever made any demand upon the Globe Navigation Company for the

(Deposition of George F. Thorndyke.)

return of the money evidenced by this Libelant's Exhibit "3"? A. No, sir.

Cross-examination.

Mr. CAMPBELL.—Q. Do you recall the time of the advances on the "Clise"? Was that prior to the advances on the "Nottingham"?

A. I think it was subsequent as I remember it. I think it was in February of the following year.

Q. October 25th, 1911. And you say that you did not have knowledge of that draft until when?

A. Until I got it from Mr. Carter, a copy of the draft from Mr. Carter in W. R. Grace & Company's office long after the "Nottingham" accident.

Q. That is the "Clise" draft?

A. No, sir, the "Nottingham" draft.

Q. When did you get a copy of the "Clise" draft?
[42]

A. When you exhibited it to me in Seattle.

Q. Was that the first time you had ever seen it?

A. Yes, sir, that was the first time.

Q. How many charters had you had with W. R. Grace & Company on your vessels prior to this one?

A. Oh, I should say 15.

Q. Did you customarily take advances under all of those charters?

A. No, we did not always take advances.

Q. You did on most of them, did you not?

A. Well, I would not say most; we took advances on a number of the charters, but I would not say the most.

Q. Advances under a master's draft?

(Deposition of George F. Thorndyke.)

A. Advances against freight?

Q. That is Grace & Company made advances under the terms of their charter-party?

A. Yes, sir, against freight.

Q. You do not know the character of drafts that the master signed in those instances?

A. No, sir, I did not know.

Q. You have no recollection of the character of draft the master signed?

A. No, sir, I did not know he signed that kind of a draft.

Q. You knew, of course, he was signing drafts?

A. I knew he was endorsing the bills of lading and I thought that endorsement on the bills of lading would call for the deduction of the advance.

Q. Didn't you know that it was customary to take drafts on advances in all cases?

A. No, sir, I do not think I did, Mr. Campbell.

Q. How do you account, then, for the fact of your producing a large number of drafts which you had taken under various charters where you had secured advances?

A. I did not produce a number of drafts. [43]

Q. Did you not produce to me a series of drafts with documents attached?

A. If I produced a number of drafts—as I remember it, we went through the files carefully and the only form of draft we found was that of the "J. W. Clise," that one.

Q. Is your recollection clear about that?

A. I think it is.

(Deposition of George F. Thorndyke.)

Q. Will you, upon your return to Seattle, examine the documents in your office and see whether or not you have not copies of other drafts given by your masters for advances under charters? A. I will.

Q. Apparently you have not concerned yourself particularly with the character of documents that the masters of vessels belonging to you have given to W. R. Grace & Company when they secured the advances.

A. Well, the only documents that I saw were those that came to my office and I looked at those.

Q. You never made it your business to customarily inquire of Grace & Company what they were taking from the master?

A. I did not inquire from Grace & Company what they were taking from the master.

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. CLISE.—Q. Didn't the masters customarily return to you whatever papers they took or gave to Grace & Company, or copies of them?

A. They always returned a file of documents which I assumed contained all of the things, all the documents in connection with that transaction with Grace & Company's office.

Q. Either the documents, duplicates or copies, as I understand? A. Yes, sir, copies. [44]

Q. And I understand your investigation in Seattle is to the effect whether or not you have received any other drafts in connection with your charter-parties with Grace & Company?

(Deposition of George F. Thorndyke.)

Mr. CAMPBELL.—Not necessarily that. I want to know whether it is not customary for his masters to execute drafts for the secured advances under their charter-parties and if he has not knowledge of that fact from the further knowledge that he has copies of drafts which he has given not only to Grace & Company but to other companies where advances have been made. [45]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing depositions is that the testimony of the witnesses Charles R. Page, A. W. Follansbee, Jr., E. T. Ford and George F. Thorndyke, is material and necessary in the cause in the caption of the said depositions named.

I further certify that on Wednesday, November 12th, and Thursday, November 13th, 1913, I was attended by Ira A. Campbell, Esq., proctor for the Libelant, and H. R. Clise, Esq., proctor for the Respondent, and by the witnesses who were of sound mind and lawful age, and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto taken in shorthand by Herbert Bennett, and afterwards reduced to typewriting; that the reading over

and signing of said depositions of the witnesses was by the aforesaid stipulation expressly waived.

Accompanying said depositions and forming a part hereof and referred to and specified therein are Libelant's Exhibit "1," Libelant's Exhibit "2," Libelant's Exhibit "3," Libelant's Exhibit "4," and Libelants Exhibit "5"; and Respondent's Exhibit "A," Respondent's Exhibit "B," Respondent's Exhibit "C," and Respondent's Exhibit "D," such exhibits are [46] marked by me.

And I further certify that I have retained the said depositions in my possession for the purpose of mailing the same with my own hand to the Clerk of the United States District Court for the Western District of Washington, Northern Division, the Court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 20th day of December, 1913.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Reporter's Transcript. Depositions of Charles R. Page, on Behalf of Libelant, and A. W. Follansbee, Jr., E. T. Ford and George F. Thorn-dyke Taken on Behalf of Respondent, Before Francis Krull, U. S. Commissioner at San Francisco,

California. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Dec. 24, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [47]

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*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. —.

FIREMEN'S FUND INSURANCE CO.,
Plaintiff,

vs.

THE GLOBE NAVIGATION COMPANY,
Defendant.

To the Honorable Judges of the Above-entitled
Court:

On this 30th day of August, 1913, the plaintiff appeared by Mr. Ira A. Campbell, one of its counsel, and the defendant appeared by Mr. H. R. Clise, its counsel; thereupon the following stipulation was entered into and proceedings had:

**[Stipulation re Testimony of A. W. Swenson et al.,
etc.]**

It is hereby stipulated by and between Ira A. Campbell, attorney for the plaintiff, and H. R. Clise, attorney for the defendant, that the testimony of A. W. Swenson and other witnesses on behalf of the parties, may be taken before A. C. Bowman, United States Commissioner of the above-entitled Court, with the same force and effect as though a formal commission were issued to take such testimony or order of reference entered. And the said testimony may be reduced to typewriting and thereafter returned into Court and used as evidence without objection as to the time, manner or form of the taking

of the same, and the signature of the witnesses is also waived.

Mr. CAMPBELL.—Will you admit that the Firemen's Fund Insurance Company is a corporation organized under the laws of the State of California?

[49]

Mr. CLISE.—I will.

Mr. CAMPBELL.—Will you admit that on the 27th day of September, 1911, A. W. Swenson was master of the schooner "William Nottingham"?

Mr. CLISE.—I will.

Mr. CAMPBELL.—And that the schooner "William Nottingham" was owned by the Globe Navigation Company?

Mr. CLISE.—I will. [50]

[Testimony of Capt. A. W. Swenson, for Plaintiff.]

Capt. A. W. SWENSON, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Q. (Mr. CAMPBELL.) I hand you a document, Captain, and ask if that is your signature?

A. That is my signature, yes, sir.

Q. Did you sign the document?

A. Apparently I did.

Q. What did you do with it after you signed it?

A. It was returned to W. R. Grace & Co. One copy, I think was left in the office of the Globe Navigation Company and I retained one copy.

Q. You retained a copy? A. I think so.

Q. Did you send a copy to W. R. Grace & Co.?

A. No, they retained one copy themselves.

Q. Where was it signed?

(Testimony of Capt. A. W. Swenson.)

A. Signed in the office of W. R. Grace & Co., in Seattle.

Q. Who was with you at the time?

A. No one except the manager of W. R. Grace & Co. in Seattle, Mr. Ford.

Q. Did you deliver a copy of it to Mr. Thorndyke?

A. W. R. Grace & Company did that.

Mr. CLISE.—I move to strike the answer as a conclusion of the witness and hearsay.

Q. Did you yourself hand a copy to Mr. Thorndyke?

A. I do not think I did. I think it was sent there by W. R. Grace.

Mr. CLISE.—I move to strike the answer as a conclusion.

Q. Did you send or hand a copy to the Globe Navigation Company or anybody representing the Globe Navigation [51] Company?

A. I do not remember whether I did.

Q. Who instructed you to go to the office of W. R. Grace & Company and sign this document?

A. The Globe Navigation Company.

Q. What officer of the Globe Navigation Company, who was acting for the Globe Navigation Company?

A. Mr. Thorndyke.

Q. Do you know what his position was with the Globe Navigation Company?

A. As manager of the Globe Navigation Company, at Seattle.

Mr. CAMPBELL.—I offer the document in evidence.

(Testimony of Capt. A. W. Swenson.)

Mr. CLISE.—I object as incompetent, irrelevant and immaterial.

Paper marked Plaintiff's Exhibit "A," filed and returned herewith.

Q. Did you receive any money from W. R. Grace & Company at the time you signed that document?

A. I received a check for a certain amount of money, yes.

Q. Did you, at that time, give them this receipt that I hand you? A. Yes, sir.

Mr. CAMPBELL.—I offer it in evidence.

Paper marked Plaintiff's Exhibit "B," filed and returned herewith.

Q. Did you advise Mr. Thorndyke that you had received this money from W. R. Grace & Company?

A. I did.

Q. Under whose instructions did you accept the money from Grace & Co.?

A. From Mr. Thorndyke of the Globe Navigation Company. [52]

Q. I hand you another document and ask you whether or not your signature is attached to it?

A. Well, I can explain that those are my initials at the bottom.

Q. You signed that, did you? A. I did.

Q. What is that document? A. Bill of lading.

Q. To whom did you hand this?

A. I signed them at W. R. Grace & Company's office and they retained the originals, and I only retained one copy. I did not hand them to anybody.

Q. You left them with W. R. Grace & Co.?

(Testimony of Capt. A. W. Swenson.)

A. Yes, sir, I signed them for them.

Q. Did you leave the bills of lading with W. R. Grace & Co.? A. Yes, sir.

Mr. CAMPBELL.—I offer this in evidence.

Paper marked Plaintiff's Exhibit "C," filed and returned herewith.

Q. From where did you sail on this voyage on which you carried the cargo for which the bills of lading were issued? A. From Westport.

Q. Where were you bound for? A. Callao.

Q. Did you afterwards, before reaching Callao, and after departing upon that voyage, get into trouble? A. I did.

Q. Briefly what happened to your vessel?

A. Well, she was waterlogged and lost part of her deckload [53] and was dismasted.

Q. Off the Columbia river?

A. Off the Columbia River.

Q. Was she afterwards picked up by the tug "Wallula" and towed back to Astoria?

A. She was.

Q. And from Astoria where was she taken?

A. Taken up to St. Johns to the Port of Portland drydock.

Q. Was her cargo discharged there?

A. The cargo was there discharged at the wharf of the Port of Portland.

Q. Was the cargo ever afterwards returned back on board of her?

A. The cargo was not returned back on board of her.

(Testimony of Capt. A. W. Swenson.)

Q. Did she ever afterwards complete the voyage to Callao? A. She did not.

Q. Did you dispose of the lumber after it was discharged from the vessel, did you personally dispose of it? A. No, sir.

Q. Did you have charge of the discharging of the cargo? A. No, I did not.

Q. Who had charge of discharging the cargo?

A. Brown & McCabe, stevedores.

Q. Who employed them to discharge her?

A. The Globe Navigation Company, I think; I am not sure on that point.

Q. Did you employ them? A. No. [54]

Cross-examination.

Q. (Mr. CLISE.) Captain, referring to this document, exhibit "A." You do not mean to say that Mr. Thorndyke or any official of the Globe Navigation Company authorized you to sign this particular paper, or any similar paper? They never saw this paper, did they?

A. I do not know. I was requested to sign it.

Q. You were requested to sign it by Mr. Ford?

A. Yes, sir.

Q. But Thorndyke did not tell you to sign this paper? A. No, he did not.

Q. He never saw this prior to your signing it?

A. No.

Q. All you were instructed to do was to go to Grace & Company and obtain from them the sum of 1650 pounds British sterling, of approved bankers' demand bills on London, that is what you were told

(Testimony of Capt. A. W. Swenson.)

to do? A. Yes, practically.

Q. When you went to Grace & Company, Ford said he would give you that amount of money provided you signed this paper?

A. That is what he said.

Q. Would he have given it to you if you had not signed this paper? A. He would not.

Mr. CAMPBELL.—I object as calling for a conclusion of the witness.

Q. Did Ford state it as a condition to his giving you the money that you had to sign this paper?

A. I objected to signing it.

Q. What did he say to you when you objected?
[55]

A. He said he could not advance the money without I signed that; that they must have that paper in order to show, or in order to be able to collect the money at the port of destination.

Q. And did he or did he not make it a condition that you should sign this paper before he would give you the money? A. Yes, sir.

Q. Now, as a matter of fact, you do not know who employed the stevedores to discharge the lumber at St. Johns, do you?

A. Well, I don't know who employed them. I understood Brown & McCabe got a contract in some way.

Q. And so you do not mean to testify then as a fact, of your own knowledge, that Brown & McCabe were employed by the Globe Navigation Company?

A. No, that I could not say.

(Testimony of Capt. A. W. Swenson.)

Q. As a matter of fact, the schooner "Nottingham" at that time, was in the hands of the United States Marshal.

A. She was in the possession of the United States Marshal.

Q. Was there a deputy United States Marshal aboard? A. There was.

Q. So that it might be equally true that Brown & McCable were employed by the United States Marshal at Portland, to discharge her, might it not?

A. Well, it might be, I could not say.

Q. So, as a matter of fact, you do not know who actually did employ Brown & McCabe?

A. No. Not to be certain of it. [56]

Redirect Examination.

Q. (Mr. CAMPBELL.) Captain, did I understand that you delivered a copy of this document marked exhibit "A" to the Globe Navigation Company after you had signed it at Mr. Ford's office?

A. I think I said I did not know whether I had delivered it or whether W. R. Grace delivered it after I signed that. I signed the several copies and it was understood that they would send copies to the Globe Navigation Company. I never handed any to the Globe Navigation Company.

Q. Now, you have secured advances on other voyages, haven't you? A. I have.

Q. You have signed documents for them, haven't you? A. I have.

Q. While you were in the employ of the Globe Navigation Company?

(Testimony of Capt. A. W. Swenson.)

A. While I was in the employ of the Globe Navigation Company.

Q. As master of the schooner "William Nottingham"? A. Yes, sir.

Mr. CAMPBELL.—I will ask that the Globe Navigation Company produce all the documents it has in its possession on which advances against freight were secured from charterers or shippers of cargo, on board vessels operated by the Globe Navigation Company.

Mr. CAMPBELL.—Will you admit what I hand you is a receipt given by the Globe Navigation Company to W. R. Grace & Co. for moneys advanced to Captain Swenson under this document marked exhibit "A"?

Mr. CLISE.—Yes, we will. [57]

Mr. CAMPBELL.—I offer this in evidence.

Paper marked Plaintiff's Exhibit "D," filed and returned herewith.

Q. (Mr. CLISE.) This Plaintiff's Exhibit "A" is dated September 27th, 1911, at Seattle, Washington. Where was your vessel at this time?

A. At Astoria.

Q. When did you leave Seattle?

A. On the 1st of October, I think. I was in Astoria to take the vessel to sea on the 2d. I was here on the 28th and 29th, I think.

(Testimony of witness closed.)

Hearing adjourned. [58]

Seattle, Washington, September 3, 1913.

Present: Mr. CAMPBELL, for the Plaintiff.

Mr. CLISE, for the Defendant.

[Testimony of George F. Thorndyke, for Plaintiff.]

GEORGE F. THORNDYKE, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Q. (Mr. CAMPBELL.) Mr. Thorndyke, I hand you a paper dated Seattle, Washington, October 25, 1911, which is signed G. G. H., master American schooner "J. W. Clise."

A. G. G. Haley, master of the "Clise."

Q. Was that document given to you by W. R. Grace & Co. upon payment to the Globe Navigation Company of the amount of money specified in the document?

A. No, the only document we got from W. R. Grace & Co. was a check for the amount advanced.

Q. Was that document given by the master of the "J. W. Clise" to W. R. Grace & Co.?

A. That is a copy of the draft, yes.

Q. At the time Grace & Company advanced the sum stated in the document? A. Yes, I think so.

Q. The amount of money stated in the document was received by the Globe Navigation Company from Grace & Co.?

A. The amount is in the statement there. You will find in the statement that it was received in devious ways in settlement of accounts for it.

Q. Is this the statement?

A. Yes, that is the statement, interest, insurance,

(Testimony of George F. Thorndyke.)

commissions and advancements and so forth. [59]

Q. The sum total is equivalent to 1300 pounds British sterling? A. Yes, sir. There is cash \$5041.79.

Q. So that it was in consideration of the items stated in the account totaling \$6,240 or reduced to English money 1300 pounds British sterling, it was in consideration of that sum that the master of the "Clise" executed this draft or document and gave it to W. R. Grace & Co.?

A. I suppose so. The captains never consult me about these drafts. Grace & Company never consult us about it. We do not know at any time what form they sign.

Q. This form was returned to you by the master?

A. As attached to that paper.

Q. Came into your possession, the possession of the Globe Navigation Company?

A. I assume it did, yes.

Q. You never asked W. R. Grace & Co. to rescind the execution of this draft, did you?

A. Yes, I asked Mr. ——— to return that particular draft.

Q. Yes.

A. No, not that particular draft.

Q. And you never tendered back to him the advances which were stated in the account and asked for a return to you of the draft? A. No.

Q. Nor did you do it in the case of the "Nottingham"?

A. No. But I spoke to him about that in the case of the "Nottingham," and he told me he would very

(Testimony of George F. Thorndyke.)

gladly give me a letter in connection with the draft.

Q. You spoke to him after the "Nottingham" had returned to [60] Astoria?

A. Yes, the first time I personally knew such a draft was being given, that form of draft was being given.

Q. Did you ever ask for the return of the draft of the "Clise"? A. No.

Q. You never asked for the return of the draft of the "Nottingham"?

A. Never asked for the return of the draft on any of them.

Mr. CAMPBELL.—I offer in evidence the draft and the account to which the witness has been referring.

Mr. CLISE.—I object as incompetent, irrelevant and immaterial.

Papers marked Plaintiff's "Exhibit "E" and "F," filed and returned herewith.

(No cross-examination.)

(Witness excused.)

Hearing adjourned. [61]

United States of America,
Western District of Washington,
Northern Division,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle, in said district, do hereby certify that the foregoing transcript, from page 1 to page 13, both inclusive, contains all of the

testimony offered before me by the parties in said cause.

The witnesses, before examination, were by me duly sworn to testify the truth, the whole truth and nothing but the truth.

I reduced the testimony to writing in shorthand and thereafter caused the same to be typewritten, and I certify that the testimony herewith returned, is the testimony given by the witnesses at said time.

Proctors for the parties stipulated that the testimony, when returned by me into Court, should have the same force and effect as if read and signed by the witnesses.

The exhibits, as shown in the record and index, are herewith returned.

I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 2d day of November, 1914.

[Seal]

A. C. BOWMAN,

U. S. Commissioner. [62]

COMMISSIONER'S TAXABLE COSTS.

Plaintiff:

Hearing for plaintiff Aug. 30, 1913.....	\$3.00
Administering oaths to 2 witnesses.....	.20
Marking and filing 6 exhibits.....	.60
Transcript above hearing 40 folios at 10c..	4.00

\$7.80

[Indorsed]: Testimony reported by Commissioner.
Filed in the U. S. District Court, Western Dist. of

Washington, Northern Division. Nov. 2, 1914.
Frank L. Crosby, Clerk. By E. M. L., Deputy. [63]

[Opinion.]

*United States District Court, Western District of
Washington, Northern Division.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

THE GLOBE NAVIGATION COMPANY, a Corporation,

Respondent.

Filed April 8, 1915.

BRUCE C. SHORTS, IRA A. CAMPBELL,
McCUTHEN, OLNEY & WILLARD, for
Libelant.

CLISE & POE, for Respondent.

NETERER, District Judge:

June 3, 1911, The Globe Navigation Company, a corporation, owner of the schooner "Wm. Nottingham," chartered the vessel to W. R. Grace & Co. for a voyage from a mill on the Columbia River to Callao, Peru. The charter-party contains the following, among other things:

"A sufficient amount for ship's ordinary disbursements at port of loading, say not exceeding one-third of the freight to be advanced by charterers if required by Captain on account of

freight under this charter-party, subject to a charge of seven per cent to cover interest, insurance and commission, advance to be endorsed on Captain's copy of charter-party, and all the bills of lading. A commission of six per cent on estimated amount of this charter is due and payable to charterers on completion of loading. Exchange at 4.86 per pound sterling."

Sept. 27, 1911, pursuant to such stipulation, W. R. Grace & Co. advanced to the master of the vessel £1650 British sterling, and the Master was required to and did execute a draft, as follows:

"£1650—% Stg. Seattle, Sept. 27, 1911.

At sign after the arrival of the American schooner 'Wm. Nottingham,' under my command, at the port of Callao, or any other place at which her voyage may terminate, I PROMISE TO PAY to the order of W. R. Grace & Co. the sum of Sixteen Hundred Pounds (£1650—%) British Sterling or approved Bankers' Demand Bills on London, for freight advance received at Seattle, Wash., as per receipt given, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of the obligation all my lien and claim against freight, vessel [64] and owners, with power to take in my name any and all steps necessary to enforce the same; and my consignees at port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel.

In case of nonpayment, the holder shall also be entitled to the benefit of all liens in law, equity or admiralty which the master or owner of the vessel may be entitled to against any part of the cargo or its owners for freight, or any other charges whatsoever.

This claim is to have priority of payment over all others that may be presented against the said freight and vessel.

My vessel is now lying at the port of Astoria, Oreg., loaded with cargo Oregon Pine and ready to sail for Callao, Peru.

Signed in triplicate, one being accomplished, the others to stand void.

A. M. SWENSON,

Master Am. Schr. 'Wm. Nottingham.' "

October 6, 1911, libelant issued to W. E. Grace & Co. a certificate of insurance in the sum of \$7920.00 on advances. On the margin of the certificate of insurance is endorsed the following:

"This insurance is to cover against all the perils enumerated in the policy which may prevent the collection of said draft in whole or in part, including general average, salvage and/ or other charges arising from sea perils to which the advances hereby insured may be subjected. The ownership of draft to be deemed sufficient proof of interest."

October 2, 1911, said schooner sailed from the port of Westport, Oregon, for Callao, Peru, with a full cargo of lumber, and subsequently encountered storms at sea which so damaged the vessel as to cause

it to become water-logged and dismasted. The vessel was abandoned at sea by her master, officers and crew, and was subsequently picked up by a tug and towed to the port of Astoria, and was later towed to the port of St. Johns, Oregon, where her cargo was discharged and the vessel docked in order that a survey of the damage might be made, and the voyage was terminated at said port and the cargo delivered into the possession of the owner thereof. Claim was made to the libelant by W. R. Grace & Co. for insurance, which was paid and in consideration of the payment of the amount of insurance W. R. Grace & Co. assigned to libelant all right, title and interest in and to the "under-mentioned interests" whether on account of salvage [65] therefrom or on any other account whatever. Thereafter this libel was instituted.

Respondent, in its answer, among other things, alleges:

"Said W. R. Grace & Co., in its own name, but actually as the agent for and for the use and benefit of this respondent, insured said advance of freight with the libelant herein, and paid to said libelant the premium demanded by it for said insurance, all, however, at the cost and expense and for the benefit of this respondent, but said W. R. Grace & Co., by reason of said advance of freight to this respondent and by the subsequent loss and abandonment of said schooner, suffered no loss whatsoever; that said libelant at all times knew of said charter-party hereinbefore referred to and its terms and con-

ditions and knew when it issued its policy of insurance to said W. R. Grace & Co. that the same was for the use and protection of this respondent, and was to hold this respondent harmless in case said respondent suffered any loss by reason of said voyage.”

and further contends:

“That there was no valuable or any consideration whatsoever passing between said Grace & Co. and this respondent for or on account of the instrument sued on by libelant herein, but the consideration for the payment of the sum of money mentioned in said instrument was based wholly upon said charter-party and the performance of the conditions of said charter-party by this respondent.”

There is no testimony before the Court upon which to predicate a finding that the insurance was obtained for the respondent, nor is there testimony before the Court upon which to predicate a finding that the libelant knew of the charter-party or of its provisions. There is an utter lack of testimony upon this contention, other than a denial on the part of the libelant that it knew of the charter-party or its provisions.

The English law that the ship owner may retain advance freight notwithstanding the loss of the goods before the freight is earned, does not obtain in the United States. Freight being compensation for the transportation of goods, is due only when goods are carried to destination, and any advance of payment may be recovered back on default of delivery,

in the absence of an agreement to the contrary. *Burn-Line Lt. v. U. S. & A. S. S. Co.*, 162 Fed. 298. The stipulation in the charter-party provides for a sum "to be advanced if required by the Captain on [66] account of freight under this charter-party," and further provides, "freight payable on the right and full delivery of cargo at final port of discharge * * * ." It is conclusive, I think, from the recitals in the "charter-party" that the rights of the parties under the advance are governed by and limited to the provisions of law governing such transactions and not by any stipulation in the "charter-party." Under the law controlling in this case the insured could have maintained an action against the respondent to recover the advance made. *St. Louis, etc. Ry. v. Conner Ins. Co.*, 139 U. S. 223. This action is predicated upon contract and not primarily upon any subrogation to the rights of the assured. The authority of the master to pledge the vessel is limited to necessities. The execution of the draft in issue was not made for necessities, but to evidence a payment required to be made by provision of the charter-party and for which the owners had provided.

The home port of the vessel being Seattle, the place where the draft was issued, the libelant must be held to a knowledge of the basis of the draft. The right to recover for "advance freight" enures to the assured under the charter-party stipulations and law applicable thereto, and not upon the "draft" executed by the master. This action is grounded upon the draft and not upon "advance freight" paid upon

which the draft is predicated. The draft being issued without authority, cannot support an action for recovery, and libelant must therefore fail in this proceeding.

A decree is accordingly directed for the respondent as prayed for.

JEREMIAH NETERER,

Judge.

[Indorsed]: Opinion. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 8, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [67]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2512.

FIREMEN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation,
tion,

Respondent.

Decree.

This cause having come on for hearing, and it having been suggested to the Court that the respondent herein, The Globe Navigation Company, has been adjudged a bankrupt during the pendency of this action; now, by consent of both parties, S. P. Weston,

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who has been heretofore duly appointed Trustee in Bankruptcy of said The Globe Navigation Company, a bankrupt, is hereby substituted as respondent in lieu of the said The Globe Navigation Company;

And thereupon said cause coming on for final hearing upon the pleadings and proof and having been argued by the Proctors for the respective parties, and due deliberation being had thereon and the Court being of the opinion that the respondent is entitled to a decree as prayed for;

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the libel herein of the Firemen's Fund Insurance Company against this respondent be and hereby is dismissed and that the respondent recover its costs in this behalf incurred, taxed and allowed, in the sum of Twenty-nine and 50/100 Dollars (\$29.50), for all of which let execution issue.

ORDERED and DECREED in open court this 21st day of April, 1915.

Libelant excepts to the signing and entry of the foregoing Decree. Exception allowed.

JEREMIAH NETERER,

Judge.

[Indorsed]: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 21, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [68]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

IN ADMIRALTY—No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent.

S. M. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),

Substituted Respondent.

Notice of Appeal.

To Clise & Poe, Proctors for the Respondent and
Substituted Respondent Above-named; and
To Frank L. Crosby, Clerk of the Above-en-
titled Court:

You, and each of you, will please take notice that
the libelant above named hereby appeals from the
final decree made and entered herein on the 21st day
of April, 1915, to the United States Circuit Court of
Appeals for the Ninth Circuit.

Dated Seattle, Washington, April 29, 1915.

McCUTCHEN, OLNEY & WILLARD

IRA A. CAMPBELL,

BALLINGER, BATTLE, HULBERT &
SHORTS.

Proctors for Libelant and Appellant.

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Copy of within Notice received and due service thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,
Attorney for Libelant. [69]

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 30, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [70]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2512

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation,
tion,

Respondent.

S. M. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),
Substituted Respondent.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Fireman's Fund Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as principal, and Hartford Accident & Indemnity Company, a corporation duly organized under the laws of the

State of Connecticut and authorized to transact business as surety within the Western District of the State of Washington, as surety, are held and firmly bound unto The Globe Navigation Company, a corporation, a bankrupt, and to S. M. Weston, trustee in bankruptcy of said The Globe Navigation, a bankrupt, the respondent and substituted respondent above named, in the sum of Two Hundred Fifty (\$250.00) Dollars, to be paid unto said respondent and substituted respondent, for the payment of which well and truly to be made we bind ourselves and each of us, our, and each of our successors and assigns jointly and severally firmly by these presents.

SEALED WITH OUR SEALS AND DATED
THIS 29th day of April, 1915.

THE CONDITIONS OF THIS OBLIGATION ARE SUCH that whereas the libelant above named, as appellant, has prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit from a decree of the above entitled court, signed and entered herein on the 21st day of April, 1915;

NOW, THEREFORE, if the above named libelant, Fireman's Fund Insurance Company, a corporation, appellant, shall prosecute its said appeal to effect and pay the costs, if the appeal is not sustained, then this obligation shall be void; otherwise the same

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shall be and remain in full force and effect.

FIREMAN'S FUND INSURANCE COM-
PANY,

By FRANK G. TAYLOR,

Gen'l Agt.

HARTFORD ACCIDENT & INDEMNITY
COMPANY,

By B. C. SHORTS,

Attorney in Fact.

[Seal] Attest: R. C. ATKINSON,

Attorney in Fact. [71]

Copy of within Bond received and due service
thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,

Attorney for Libellant.

[Indorsed]: Cost Bond on Appeal. Filed in the
U. S. District Court, Western Dist. of Washington,
Northern Division. Apr. 30, 1915. Frank L. Crosby,
Clerk. By Ed M. Lakin, Deputy. [72]

*In the District Court of the United States for the
Western District of Washington, Northern Divi-
sion.*

IN ADMIRALTY—No. 2512

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libellant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent.

S. M. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),
Substituted Respondent.

Notice of Filing Cost Bond on Appeal.

To Clise & Poe, Proctors for Respondent and
Substituted Respondent above named:

Please take notice that the libelant above named,
appellant, has this day filed in the office of the clerk
of the District Court of the United States for the
Western District of Washington, Northern Division,
its cost bond on appeal, which said bond is executed
by said respondent, as principal, and by Hartford
Accident & Indemnity Company, a corporation, as
surety, and that the address, residence and principal
place of business of R. C. Atkinson, who attested as
attorney in fact for said surety the said bond, is
Office No. 607 Hoge Building, Seattle, Washington,
and that the address, residence and place of business
of B. C. Shorts, who executed said bond as attorney
in fact for said surety is Office No. 901 Alaska Build-
ing, Seattle, Washington.

Dated Seattle, Washington, Apr. 30, 1915. [73]

McCUTCHEN, OLNEY & WILLARD,

IRA A. CAMPBELL,

BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Appellant, the Respondent Above
Named.

Copy of within Notice received and due service
thereof acknowledged this 30th day of April, 1915.

H. R. CLISE,
Attorney for Libelant.

[Indorsed]: Notice of Filing Cost Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 30, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [74]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 2512

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation,
tion,

Respondent,

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),

Substituted Respondent.

**[Stipulation and Order Directing Transmission of
Original Exhibits, etc., to Appellate Court.]**

IT IS HEREBY STIPULATED AND
AGREED by and between the parties hereto that all
exhibits introduced in the above entitled cause, and
in the depositions taken in said cause, be sent to the
United States Circuit Court of Appeals for the Ninth

Circuit as original exhibits with the apostles on appeal.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Libelant.

CLISE & POE,

Proctors for Respondent.

IT IS SO ORDERED.

JEREMIAH NETERER,
District Judge. [75]

[Indorsed]: Stipulation for Use on Appeal of Original Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 25, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [76]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corporation.

Respondent,

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),
Substituted Respondent.

Assignment of Errors.

Comes now the FIREMAN'S FUND INSURANCE COMPANY, libelant and appellant herein, and says that in the record, opinion, decision and final decree in said cause there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors on which it relies, to wit:

I.

That the District Court erred in entering the decree herein of date the 21st day of April, 1915, dismissing the libel herein.

II.

That the District Court erred in entering the entering the decree herein of date the 21st day of April, 1915, adjudging that respondent (appellee) recover its costs [77] in the sum of twenty-nine and 50/100 (29.50) dollars.

III.

That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the libel and under the evidence adduced to a decree in the sum of eight thousand thirty-two and 20/100 (8,032.20) dollars, with interest and costs as prayed for in the libel herein.

IV.

That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the evidence adduced and under the prayer for gen-

eral relief made in said libel to a decree in the sum of eight thousand thirty-two and 20/100 (8,032.20) dollars, with interest and costs.

V.

That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the substantive facts alleged and under the general relief prayed for in the libel and on the evidence adduced to a decree in the sum of eight thousand thirty-two and 20/100 (8,032.20) dollars.

VI.

That the District Court erred in holding and deciding that there was a variance between the allegations of the libel and the proof adduced, and for that reason denying unto libelant (appellant) the relief prayed for in said libel.

VII.

That the District Court erred in holding and [78] deciding that the authority of the master to pledge the vessel was limited to necessities.

VIII.

That the District Court erred in deciding that the execution of the draft issued was not made for necessities.

IX.

That the District Court erred in holding and deciding that libelant (appellant) must be held to the basis of respondent's (appellee's) knowledge of the draft.

X.

That the District Court erred in holding and deciding that the right to recovery for advanced freight

enured to libelant (appellant) under the charter-party stipulations and law applicable thereto, and not upon the draft executed by the master.

XI.

That the District Court erred in holding and deciding that the action is grounded upon the draft and not upon the advanced freight paid, and in not entering a decree in libelant's (appellant's) favor under the prayer for general relief in the libel on the evidence adduced.

XII.

That the District Court erred in holding and deciding that the draft was issued without authority.

XIII.

That the District Court erred in holding and deciding that the draft could not support an action for recovery. [79]

In order that the foregoing assignment of errors may be and appear of record said appellant files and presents the same, and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided, and said appellant prays a reversal of the decree herein heretofore made and entered in the above cause and appealed from, and that it may have such other and further relief as shall be deemed meet and equitable.

Dated: May 26th, 1915.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Libelant and Appellant.

Receipt of a copy of the within assignment of errors is hereby admitted this 28th day of May, 1915.

CLISE & POE,

Proctors for Respondent.

S.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 29, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. [80]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent,

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),

Substituted Respondent.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

You will please prepare the apostles in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in said

court, and include in said apostles the following pleadings, proceedings and papers on file, to wit:

1. All those papers required by section 1 of paragraph I of rule 4 of the rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit. [81]

2. All the pleadings in the said cause, including the libel, and amended libel, and the answers to the same, with any and all exhibits annexed to said pleadings.

3. All the testimony and other proofs adduced in the cause, including the testimony taken at the trial; all depositions taken by either party and admitted in evidence; all exhibits introduced by either party, said exhibits and all of them to be sent up to said Circuit Court of Appeals as original exhibits.

4. The opinion and decision of the Court.

5. The final decree, notice of appeal, cost bond on appeal, and notice of filing of bond.

6. The assignment of errors.

We hereby waive our right to have the record in this case printed by the clerk of the above-entitled court, and hereby elect to have said record printed by the clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT &
SHORTS,

Proctors for Libelant.

[Indorsed]: Praeipere for Apostles on Appeal.
Filed in the U. S. District Court, Western Dist. of

Washington, Northern Division. May 25, 1915.
Frank L. Crosby, Clerk. By E. M. L., Deputy. [82]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent,

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),
Substituted Respondent.

**Certificate of Clerk U. S. District Court to Apostles,
etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 82 pages, numbered from 1 to 82, inclusive, to be a full, true, and correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause, as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is

called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington. [83]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Libelant and Appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 177 folios at 15c.....	\$26.55
Certificate of Clerk to transcript of record, 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to Original Ex- hibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
<hr/>	
Total,	\$28.00

I hereby certify that the above cost for preparing and certifying record amounting to \$28.00 has been paid to me by Messrs. McCutchen, Olney & Willard, Ira A. Campbell, Esq., and Messrs. Ballinger, Battle, Hulbert & Shorts, Proctors for Libelant.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at

Seattle, in said District, this 27th day of July, 1915.

[Seal] FRANK L. CROSBY,
Clerk U. S. District Court. [84]

[Indorsed]: No. 2630. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Appellant, vs. Globe Navigation Company, a Corporation, and S. P. Weston, as Trustee in Bankruptcy of the Globe Navigation Company, a Corporation, Bankrupt, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 30, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation,

Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent,

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),

Substituted Respondent.

**Order Enlarging Time [to July 1, 1915] to Transmit
Apostles on Appeal.**

Now, on this 27th day of May, 1915, upon motion of Proctors for libelant, and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby, extended to and including the 1st day of July, 1915.

JEREMIAH NETERER,
District Judge.

[Indorsed]: No. 2512. In the District Court of the United States for the Western District of Washington. Fireman's Fund Ins. Co., a Cor., Libelant, vs. Globe Navigation Co., a Cor., Respondent. S. P.

Weston, etc., Substituted Respondent. Order Enlarging Time to Transmit Apostles on Appeal to Circuit Court of Appeals. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 27, 1915. Frank L. Crosby, Clerk. by Ed. M. Lakin, Deputy.

No. 2630. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to July 1, 1915, to File Record Thereof and to Docket Case. Filed Jul. 30, 1915. F. D. Monckton, Clerk.

*In the District Court for the United States for the
Western District of Washington, Northern
Division.*

No. 2512.

FIREMAN'S FUND INSURANCE COMPANY,
Libelant,

vs.

GLOBE NAVIGATION COMPANY, a Corpora-
tion,

Respondent,

S. P. WESTON (Trustee in Bankruptcy of Globe
Navigation Company, a Bankrupt),
Substituted Respondent.

**Order Enlarging Time [to August 1, 1915] to
Transmit Apostles on Appeal to Circuit Court
of Appeals.**

Now, on this 26th day of June, 1915, upon motion of proctors for libelant, and for sufficient cause appearing, it is ordered that the time within which the

Clerk of this court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby, extended to and including the 1st day of August, 1915.

JEREMIAH NETERER,
District Judge.

[Endorsed]: No. 2512. In the District Court of the United States for the Western District of Washington. Fireman's Fund Insurance Company, Libellant, vs. Globe Navigation Co., a Cor., Respondent. S. P. Weston, etc., Substituted Respondent. Order Enlarging Time.

No. 2630. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 1, 1915, to File Record Thereof and to Docket Case. Filed Jul. 30, 1915. F. D. Monckton, Clerk.

No. 2630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY

(a corporation),

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a corporation) and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant.

Filed this.....day of September, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY
(a corporation),

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a corporation) and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

BRIEF FOR APPELLANT.

Statement of the Case.

The American schooner "Wm. Nottingham" sailed in October, 1911, from Westport, Oregon, for Callao, Peru. She carried a full cargo of lumber for delivery at the latter port, but she never reached her destination. On the contrary, she became waterlogged and was dismasted off the Columbia River on the very first leg of her voyage, and, after abandonment by her officers and crew, was rescued by a tug and towed to

Astoria and afterward to the port of St. Johns, Oregon, where such of her aforesaid cargo as had not been washed overboard at sea was discharged.

The charterer of the vessel for the ill-fated voyage was W. R. Grace & Co. Her owner was the Globe Navigation Company, appellee herein.

The charterer, before the vessel set sail, provided the captain, for and as the representative of the owner, with funds in the amount of eight thousand and thirty-two and twenty hundredths (8032.20) dollars as the equivalent of £1650 British sterling. Upon receipt of said sum, the captain gave W. R. Grace & Co. a certain instrument of indebtedness (in evidence as Libellant's Exhibit 3 and Plaintiff's Exhibit A), which was in words and figures as follows:

“£1650—o/o Stg. Seattle, Sept. 27, 1911.

At sight after the arrival of the American schooner 'Wm. Nottingham', under my command, at the port of Callao, or any other place at which her voyage may terminate, I PROMISE TO PAY to the order of W. R. Grace & Co. the sum of sixteen hundred fifty pounds (£1650-0/0) British Sterling or approved Banker's Demand Bills on London, for freight advance received at Seattle, Wash., as per receipt given, for the payment of which I hereby pledge my vessel and her freight; and I hereby assign to the legal holder of the obligation, all my lien and claim against freight, vessel and owners, with power to take in my name any and all steps necessary to enforce the same; and my consignees at port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel. In case of non-payment, the holder shall also be entitled to the benefit of all liens in law, equity or

admiralty which the master or owner of the vessel may be entitled to against any part of the cargo or its owners for freight, or any other charges whatsoever.

This claim is to have priority of payment over all others that may be presented against the said freight and vessel.

My vessel is now lying at the port of Astoria, Oreg., loaded with cargo Oregon pine and ready to sail for Callao, Peru.

Signed in triplicate, one being accomplished, the others to stand void.

A. M. SWENSON,
Master Am. Schr. 'Wm. Nottingham.' "

W. R. Grace & Co. took out insurance on this payment with the Fireman's Fund Insurance Company, appellant herein (the certificate of insurance being in evidence as Libelant's Exhibit 1), and the latter paid the insurance after the abandonment of the contemplated voyage and the return of the vessel to the port of St. Johns, taking from W. R. Grace & Co. an express subrogation of its rights in the premises against the Globe Navigation Company (Libelant's Exhibit 5) and an assignment of the aforementioned draft duly endorsed (Libelant's Exhibit 3).

The receipt of the so-called advance was acknowledged in writing both by the captain of the vessel (Plaintiff's Exhibit B) and by her owner, the Globe Navigation Company (Libelant's Exhibit 4 and Plaintiff's Exhibit D).

There may be ground for query whether the foregoing sum was paid as an advance against freight evidenced by the sight draft, or as prepaid freight

simply. But it is a fact undisputed that the Globe Navigation Company retained and still retains that money; and it is a further fact equally undisputed that the Globe Navigation Company never earned that money, so retained, by delivery of the lumber cargo of the "Wm. Nottingham" at Callao in accordance with the terms of the charter party.

Our position is plain and is simply this: The Globe Navigation Company is holding money which it has not earned and which, under the settled American law, it is not entitled to retain. To that money this appellant, in our view, is indisputably entitled, whether it be regarded as an advance against freight evidenced by the draft, or as prepaid freight. But, if the court hold, as did the court below (tr. p. 70) that we are not entitled to said money by virtue of the draft and our ownership thereof, and upon the ground of contract, we are certainly and unquestionably entitled thereto as successor by subrogation to the right of W. R. Grace & Co., to a return of prepaid freight unearned; and if the original libel was not framed upon that theory, the court is nevertheless obligated under the admiralty rules applicable in the premises, to give us, under our prayer for general relief, the decree for which we pray.

Specifications of Error.

Errors have accordingly been assigned, in the Apostles on appeal, to the decree of the District Court, as follows:

1. That the District Court erred in entering the decree herein of date the 21st day of April, 1915, dismissing the libel herein.

2. That the District Court erred in entering the decree herein of date the 21st day of April, 1915, adjudging that respondent (appellee) recover its costs in the sum of twenty-nine and 50/100 (29.50) dollars.

3. That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the libel and under the evidence adduced to a decree in the sum of eight thousand thirty-two and 20/100 (8032.20) dollars, with interest and costs as prayed for in the libel herein.

4. That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the evidence adduced and under the prayer for general relief made in said libel to a decree in the sum of eight thousand thirty-two and 20/100 (8032.20) dollars, with interest and costs.

5. That the District Court erred in not holding and deciding that libelant (appellant) was entitled on the substantive facts alleged and under the general relief prayed for in the libel and on the evidence adduced to a decree in the sum of eight thousand thirty-two and 20/100 (8032.20) dollars.

6. That the District Court erred in holding and deciding that there was a variance between the allegations of the libel and the proof adduced, and for that

reason denying unto libelant (appellant) the relief prayed for in said libel.

7. That the District Court erred in holding and deciding that the authority of the master to pledge the vessel was limited to necessities.

8. That the District Court erred in deciding that the execution of the draft issued was not made for necessities.

9. That the District Court erred in holding and deciding that libelant (appellant) must be held to the basis of respondent's (appellee's) knowledge of the draft.

10. That the District Court erred in holding and deciding that the right to recovery for advanced freight inured to libelant (appellant) under the charter-party stipulations and law applicable thereto, and not upon the draft executed by the master.

11. That the District Court erred in holding and deciding that the action is grounded upon the draft and not upon the advanced freight paid, and in not entering a decree in libelant's (appellant's) favor under the prayer for general relief in the libel on the evidence adduced.

12. That the District Court erred in holding and deciding that the draft was issued without authority.

13. That the District Court erred in holding and deciding that the draft could not support an action for recovery.

Brief of the Argument.

I. Viewing the payment to the captain as an advance against freight evidenced by the captain's draft, appellant is entitled to recover upon the draft (which is due and payable) as the legal owner and holder thereof by due endorsement and assignment.

II. Viewing the payment to the captain as prepayment of freight, appellant is entitled to a recovery thereof by virtue of subrogation to the rights of W. R. Grace & Co., the charterer. The right of the charterer to a return of prepaid but unearned freight money is established in American law.

III. If appellant, following the theory that the payment to the captain was an advance *against* rather than *prepaid* freight, mistakenly sued upon the draft, instead of predicating its libel upon its rights by subrogation to a return of the prepaid but unearned freight money, the Court should, none the less, award appellant, under the general prayer for relief, the decree which it asks; for it is the settled rule of admiralty practice and pleading that there is no technical rule of variance in admiralty and that it is the duty of the court to extract the real case from the whole record and decide accordingly. The court below therefore erred in deciding against appellant because its action was "grounded upon the draft and not upon 'advance of freight.' "

I.

VIEWING THE PAYMENT TO THE CAPTAIN AS AN ADVANCE AGAINST FREIGHT EVIDENCED BY THE CAPTAIN'S DRAFT, APPELLANT IS ENTITLED TO RECOVER UPON THE DRAFT (WHICH IS DUE AND PAYABLE) AS THE LEGAL OWNER AND HOLDER THEREOF BY DUE ENDORSEMENT AND ASSIGNMENT.

This draft was duly executed by Captain Swenson of the "Wm. Nottingham" before he set sail from Westport, Oregon, and at that time he received the amount of money represented by the draft and gave a receipt therefor (tr. p. 55). The draft by its terms is now, and has been, ever since the vessel returned to and discharged her cargo at the Port of St. Johns, due and payable, the draft providing, "At sight after the arrival of the American Schooner 'Wm. Nottingham', under my command, at the Port of Callao, *or any other place at which her voyage may terminate*, I PROMISE TO PAY," etc. (italics ours). The voyage in question terminated, as the facts recited in the Statement of the Case (supra) show, and as the court below found, at the Port of St. Johns, Oregon. In the opinion of Mr. E. T. Ford, the Sub-manager of W. R. Grace & Co., the latter company could have negotiated the draft (tr. p. 32). When the Fireman's Fund Insurance Company paid W. R. Grace & Co. the insurance on this draft, it was surrendered to the insurer, duly endorsed by W. R. Grace & Co. The respondent (appellee) by its answer admits that the insurance company has demanded of it the payment of the aforementioned sum of eight thousand thirty-

two and 20, 100 (8032.20) dollars, and that it has refused to pay the same.

The court below upholds this refusal upon the ground that the master had no authority to execute the draft and to bind the owners of the ship thereby. To this, we say that while the record discloses no *express* authority to the master to execute the draft, it appears repeatedly (see e. g., tr. pp. 33, 34, 59 and 60) that these drafts were customarily in use as between W. R. Grace & Co., as charterer, and the Globe Navigation Company, as owner of ships. Mr. Ford, for instance, testified that to his personal knowledge this was the type of draft that W. R. Grace & Co. normally used in their transactions with the Globe Navigation Company and that his company never made advances without taking such drafts (tr. pp. 33, 34). Mr. Thorndyke, the manager of the Globe Navigation Company, indeed admits that the draft (Plaintiff's Exhibit E), issued in connection with a similar advance on the steamer "J. W. Clise" under charter from his company to W. R. Grace & Co., was executed in the same manner as the "Wm. Nottingham" draft (tr. p. 45). It seems most singular that this "Clise" draft should not have been seen by or known to Mr. Thorndyke until after the disaster to the "Wm. Nottingham", when a copy thereof, produced from the office files of the Globe Navigation Company itself in response to the call of the proctor for libellant (tr. p. 60), was exhibited to him during his deposition (tr. p. 61). It seems more singular, even, in the face of the testimony of Mr. Ford (corroborated by that of Captain Swenson) that

these drafts were regularly used in connection with advances by W. R. Grace & Co. to the Globe Navigation Company, that Mr. Thorndyke should never have seen any of them. Yet such is his testimony (tr. p. 47). We frankly confess that it never occurred to us for a moment at the time of the framing of this libel that the Globe Navigation Company would thus disavow all knowledge of these drafts.

Save for this contention, that the draft was executed by the captain without authority in that behalf, the appellee has no defense to the action on the draft, the allegations of its answer, to the effect that the insurance was obtained for the owner of the ship, and that the draft was executed without consideration, being, as the court below very rightly pointed out (tr. p. 69), unsupported by any evidence.

We venture to submit that the testimony that these drafts were in common use in connection with advances from W. R. Grace & Co. to the Globe Navigation Company, establishes that the master had, under the custom and usage thus prevailing, at least implied authority to execute this particular draft. If, however, the appellees insist on disavowing responsibility for the same and in regarding the payment to the master as a prepayment of freight, they have yet to show, and we contend that they cannot, under American law, show, that we are not entitled to recover back such prepaid freight, when it appears, as it here appears, that the same was not earned. This leads naturally to the next point in the argument.

II.

VIEWING THE PAYMENT TO THE CAPTAIN AS PRE-PAYMENT OF FREIGHT, APPELLANT IS ENTITLED TO A RECOVERY THEREOF BY VIRTUE OF SUBROGATION TO THE RIGHTS OF W. R. GRACE & CO., THE CHARTERER. THE RIGHT OF THE CHARTERER TO A RETURN OF PREPAID BUT UNEARNED FREIGHT MONEY IS ESTABLISHED IN AMERICAN LAW.

The Fireman's Fund Insurance Company paid to W. R. Grace & Co., after the abandonment of the voyage, the amount of the advance, taking from the assured a subrogation in the usual form to any and all rights which it might have against third parties in the premises (tr. p. 21 and Libellant's Exhibit 5). It needs no citation of authority, of course, to uphold the statement that even apart from such express subrogation the insurer is, in virtue of the established equitable doctrine, subrogated upon payment of and to the amount of the insurance, to any and all rights which the insured may have against third party wrongdoers. And, of course, whatever may have been or is the common-law procedure, suit for recovery in these circumstances may, in a court of admiralty, be asserted by the insurance company in its own name alone, where it has paid the insured the full value of the loss.

Cooley, Briefs on the Law of Insurance, Vol 4,
p. 3930, and cases cited;

The Potomac v. Cannon, 105 U. S. 630;

*Norwich Union Fire Ins. Society v. Standard Oil
Company*, 59 Fed. 984;

Sheldon on Subrogation, Sec. 221.

The respondent (appellee) in its reply brief in the court below, submitted an elaborate array of *English* authorities to show (using the words of the brief), that, "from Lord Tenterden's time to the present the rights of the ship-owner by English law to retain advance freight, notwithstanding the loss of the goods before the freight is earned, seems never to have been seriously doubted". That, of course, we grant. But these proceedings are before an American court, and the American cases hold emphatically and precisely the reverse of the English ruling. The American doctrine is that freight money prepaid but not actually earned is to be returned to the charterer. This doctrine will be found laid down in the following among numerous cases:

Burn Line v. United States & A. S. S. Co.,
162 Fed. 298;

De Sola v. Pomares, 119 Fed. 373;

The Kimball, 3 Wall. 37, 45, 46; 18 L. ed. 50;

Chase v. Alliance Ins. Co., 91 Mass. (9 Allen) 311.

The court below, then, very rightly held on this point as follows:

"The English law that the ship-owner may retain advance freight notwithstanding the loss of the goods before the freight is earned, does not obtain in the United States. Freight being compensation for the transportation of goods, is due only when goods are carried to destination, and any advance of payment may be recovered back on default of delivery, in the absence of an agreement to the contrary. *Burn Line Lt. v. U. S. & A. S. S. Co.*, 162 Fed. 298",

It might naturally have been expected that the District Court, taking the view just expressed, and seeing that the facts shown by the record as a whole and very largely disclosed by respondent's very answer bring this case within the rule thus enunciated, would have decreed for the libelant, despite the fact that the action was originally instituted upon the draft; for the District Court was sitting as a court of admiralty, and such a court pays no regard to technical variance, provided only the record as a whole disclose a substantial case for the libelant. The court, however, declined to decree in our favor upon the ground that the libelant had mistakenly grounded its action upon the draft, which the court held the master was without authority to execute. In so declining, said court, we respectfully submit, committed error. This contention is the subject of our next division.

III.

IF APPELLANT, FOLLOWING THE THEORY THAT THE PAYMENT TO THE CAPTAIN WAS AN ADVANCE AGAINST RATHER THAN PREPAID FREIGHT, MISTAKENLY SUED UPON THE DRAFT, INSTEAD OF PREDICATING ITS LIBEL UPON ITS RIGHTS UNDER THE SUBROGATION TO A RETURN OF THE PREPAID BUT UNEARNED FREIGHT MONEY, THE COURT SHOULD, NONE THE LESS, AWARD APPELLANT, UNDER THE GENERAL PRAYER FOR RELIEF, THE DECREE WHICH IT ASKS: FOR IT IS THE SETTLED RULE OF ADMIRALTY PRACTICE AND PLEADING THAT THERE IS NO TECHNICAL RULE OF VARIANCE IN ADMIRALTY AND THAT IT IS THE DUTY OF THE COURT TO EXTRACT THE REAL CASE FROM THE WHOLE RECORD AND DECIDE ACCORDINGLY. THE COURT BELOW THEREFORE ERRED IN DECIDING AGAINST APPELLANT BECAUSE ITS ACTION WAS "GROUNDED UPON THE DRAFT AND NOT UPON 'ADVANCE OF FREIGHT.'"

The court below, as heretofore stated, held that,

while the libelant would have been entitled to recover in an action grounded upon the doctrine of freight prepaid but unearned, it failed in the actual proceedings brought because they were predicated upon the captain's draft. In these circumstances, we contend that the court below committed error in not observing the settled rule of admiralty practice and procedure requiring that the judge shall, unless the defects in the libel shall have occasioned surprise to the adverse party, extract the real case from the whole record, and, under the general prayer, decree for the libelant if he be entitled to relief in consideration of all the facts.

This duty of admiralty courts to do justice under the general prayer, regardless of the precise trend of the pleading, is well stated in

Sonsmith v. Donaldson, 21 Fed. 671 at 673:

“The libels in the present cases do not pray specifically for an adjustment of a general average loss. On the contrary, they pray for a decree against the propeller for the full amount of the loss, on the ground that it resulted from the breach of duty on the part of the propeller in not properly performing the contract of towage. *But, under the prayer for general relief, it is competent for the court to pass such decree as may be required by the proof in the record, although not fully and precisely stated in the libel.*”

This attention to the prayer for general relief was, as a matter of fact, very early and very emphatically enjoined upon admiralty courts by the Supreme Court of the United States in the case of

Penhallow et al. v. Doane's Administrators,
3 Dall. 54, 1 L. Ed. 507,

the court saying:

“It is alleged damages were not prayed for by the libel. It is a sufficient answer, that there is a prayer for general relief. And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this case would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it; without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it.”

See, also,

Pratt v. Thomas, 19 F. C. No. 11377.

The admiralty rules in this general connection were elaborately reviewed very recently by the Circuit Court of Appeals for the Fourth Circuit in the case of

The Prudence (1913), 204 Fed. 66,

wherein the court said (pp. 68-69) referring particularly to collision cases but in language broad enough to cover the situation generally:

“Even where there are only two parties to a collision controversy, there is no rigid rule that a libellant, alleging one fault on the part of a defendant vessel, cannot recover on proof of a different fault. In The Cambridge, 4 Fed. Cas. 1118, the libel alleged only that the defendant’s steamer ported when she should have starboarded. The evidence for the steamer proved that she was running at too great a speed in a fog and had no lookout forward. Judge Lowell held that the libellant could rely on these faults as well as on those alleged in the libel. He said:

‘In our courts the question is treated as a matter of evidence rather than of pleading. If surprise is shown, there may be reason for excluding the testimony, or for giving time to meet it. If the witnesses of one side vary the case from that which his pleadings set up, it may be reason for disbelieving them. But it is the practice of our courts of admiralty rather to extract the truth and found a decree upon it, whenever, by amendment or otherwise, justice can be fully done to both parties, than to follow any very strict rules of variance.’

Justice Curtis in *The Clement*, 5 Fed. Cas. 1015, said:

‘In all collision cases the court will look at the allegations of both the parties of all matters of fact, upon which fault or its absence depends; they will consider which of those allegations is proved, not allowing either party to contradict by proof what he has alleged; and, having thus extracted the real case from the whole record, will pronounce for the one party or the other as that case requires.’

In the case at bar there are four parties to the controversy and not two. Such a contest differs in kind, as well as in degree, from that in which there are but two antagonists. The rules which govern it must differ accordingly, whether it be waged in a court of admiralty or on the pages of *Captain Marryatt*. The question whether the *Prudence* and the *Dempsey* were on the west or on the east side of the channel was raised by the pleadings of the *Norfolk* and *Barge 14*. To this, among other issues, all parties directed their testimony. The rule which forbids a litigant to prove something which he has not charged is largely intended to prevent a surprise to his adversary. *The Steamer Syracuse*, 12 Wall. 167, 20 L. ed. 382.

In this case there was no surprise and no possibility of it. Apparently every one who could throw any light upon the collision or its causes testified. In the admiralty there are no technical rules of variance or departure. The court below, having the whole matter before it, was bound to decree in accordance with the facts established. *Dupon v. Vance*, 19 How. 172, 15 L. Ed. 584; *The Quickstep*, 9 Wall. 670, 19 L. Ed. 767."

The case of

The Syracuse, 12 Wall. 167; 20 L. ed. 382, referred to in the foregoing excerpt, is perhaps the leading case on the subject. The Supreme Court of the United States said therein (p. 384):

"It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the court can see there was no design on his part in omitting to state them. *The Quickstep*, 9 Wall. 670 (76 U. S. XIX, 768); *The Clement*, 2 Curt. 363. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly. It is very clear that the libellant had no design in view in omitting to state the failure to stop as a fault, and equally clear, that the proof on that subject, coming, as it did, from the opposite party, could not have operated to surprise them."

See, also,

The Stephen Morgan, 94 U. S. 599; 24 L. ed. 266;
The Volunteer, 149 Fed. 723.

In the case of *The Syracuse* (supra) the court lays special stress on the fact that the proof which was helpful to the libelant came "from the opposite party" (see the latter part of the quotation above) and in the case of *The Clement*, 5 Fed. Cas. 1015, referred to above in the excerpt from *The Prudence*, Justice Curtis states that "the court will look at the allegations of both the parties". Be it noted, therefore, in respect to the case at bar, first, that the allegation that the money paid Captain Swenson was prepaid freight, is made by respondent (appellee) in Paragraph VIII of its answer (tr. 12) as follows:

" * * * that at Seattle, Washington, on June 3, 1911, the respondent entered into a written charter-party with W. R. Grace & Co., to transport a cargo of lumber from the Columbia River to Callao, Peru, for a consideration therein agreed upon, and as a part of the consideration therefor it was agreed *that one-third of the freight would be advanced and paid by charterers on account of the freight under said charter-party* subject to a charge of seven per cent. to cover interest, insurance and commission * * *" (italics ours),

and, in the second place, that the proof in support of said allegation was likewise provided by respondent or appellee (see p. 23 of the transcript).

We respectfully ask that the decree entered in the court below be reversed, and that said court be directed to enter a decree for libelant (appellant here) in accordance with the prayer of the libel, and that

appellant be accorded its costs and such other and further relief as may be appropriate in the premises.

Dated, San Francisco,

September 18, 1915.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant.

NO. 2630.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COM-
PANY (a corporation,

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a
corporation) and S. P. WESTON, as trus-
tee in Bankruptcy of the GLOBE NAVI-
GATION COMPANY (a corporation),
Bankrupt,

Appellees.

BRIEF FOR APPELLEES.

CLISE & POE,

Proctors for Respondent.

New York Block, Seattle, Washington.

Filed this..... day of October, 1915.

FRANK D. MOCKTON, Clerk.

By.....Deputy Clerk.

NO. 2630.

IN THE

United States Circuit Court of Appeals

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FIREMAN'S FUND INSURANCE COM-
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corporation) and S. P. WESTON, as trustee in Bankruptcy of the GLOBE NAVI-
GATION COMPANY (a corporation),
Bankrupt,

Appellees.

BRIEF FOR APPELLEES.

ADDITIONAL STATEMENT OF THE CASE.

The Globe Navigation Company, on the 3rd day of June, 1911, at Seattle, Washington, chartered the American schooner "Wm. Nottingham" to W. R. Grace & Co. for a voyage from Westport, Oregon, to Callao, Peru. A copy of the charter party appears in the record as respondent's Exhibit A. In pursuance of the terms of this charter party the vessel was loaded and was ready to sail the latter part of Sep-

tember, 1911. The master of the schooner then came to Seattle, the home port of the schooner "Wm. Nottingham", and as directed by Mr. Thorndyke (tr. p. 57) applied to the offices of W. R. Grace & Co. in Seattle for a certain sum of money in accordance with the provisions of the charter party, which reads as follows:

"A sufficient amount for ship's ordinary disbursements at the port of loading, same not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, subject to a charge of seven per cent to cover interest, insurance and commission; advance to be endorsed on captain's copy of charter party and all bills of lading."

W. R. Grace & Co. were willing to pay the above sum of money, but instead of endorsing it on the captain's copy of the charter party and all the bills of lading, required the captain to sign a receipt therefor, which receipt is the instrument in writing upon which libellant sued. It appears that W. R. Grace & Co. had a certain iron-clad regulation which required that a captain desiring an advance similar to the one the captain of the schooner "Wm. Nottingham" asked for, should sign this particular form of receipt or else he could not get the money (tr. p. 35) and, consequently, the captain signed this particular receipt and obtained the money and turned it over to his company, but did not tell his company that he had

NO. 2630.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COM-
PANY (a corporation,

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a
corporation) and S. P. WESTON, as trustee in Bankruptcy of the GLOBE NAVI-
GATION COMPANY (a corporation),
Bankrupt,

Appellees.

BRIEF FOR APPELLEES.

ADDITIONAL STATEMENT OF THE CASE.

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done anything of the kind (tr. p. 57). Immediately after the charter party was entered into and on June 5th, 1911 (tr. p. 27) W. R. Grace & Co. took out what is called a "covering note" against this insurance to protect themselves against any loss which they might incur by reason of having to pay this advance on account of freight. The agent of the Fireman's Fund who gave this covering note didn't take the trouble to inquire whether it was an advance on freight or an advance against the captain's draft, as he said it made little difference to them (tr. p. 26). After the advance was actually made, W. R. Grace & Co. reported the exact amount of the same to the Fireman's Fund and they then issued a policy of insurance for which they charged and received the regular premium for a risk of that kind.

The charter party provides that W. R. Grace & Co. shall charge the amount of this premium (together with interest and commission) to the Globe Navigation Company, which they did by deducting it from the amount of the advance.

The Trial Court in its opinion says:

"There is no testimony before the Court upon which to predicate a finding that the insurance was obtained for the respondent."

Through some inadvertence, the Trial Court must have overlooked the uncontradicted testimony

of Mr. Ford on page 29 of the transcript, where he testifies as follows:

Q. In placing this insurance for whom were you acting?

A. We were acting for the Globe Navigation Company, to whom we charged and collected the amount of the premium.

Q. What do you mean by saying that you were acting for the Globe Navigation Company?

A. We chartered this vessel and agreed to pay a certain amount of freight for her; at the same time we agreed to make a certain amount of advance against the freight, which we did; the advance we insured, and in so doing we practically stepped into the position of the Globe Navigation Company in insuring our own freight, with the understanding that if they insured the freight they would not insure more than the balance over the amount of this indebtedness."

Mr. Ford testified (tr. p. 27) that he was the sub-manager of W. R. Grace & Co., stationed at Seattle, in June, 1911, and signed the charter party referred to on behalf of W. R. Grace & Co.

Our contention is simply this: That he obtained this advance on account of freight under and in accordance with the terms of the charter party, and the captain, when he was sent to collect the same at the home port of the vessel and the respondent, was simply a messenger boy, with no more authority than a messenger boy, to collect this money, which he did;

and if, in order to get it, he signed an instrument as a receipt therefor which attempted to change the provisions of the charter party, but which it was not the intention of anyone that it should, he simply acted without authority. That we having paid the premium of the insurance company through our agents W. R. Grace & Co. to protect ourselves if the vessel should meet with any disaster, we should have the protection for which we paid. The insurance company desires to be placed in a position, first, where it could get the premium from us and then wants to be made whole against the very loss for which we were paying for protection; in other words, the insurance company is playing the game of "Heads I win, and tails you lose", because if its position is correct, it couldn't lose.

The Insurance Company did not know anything of the captain's receipt or draft in June, when it issued the covering notes because it was not then in existence or in October, when it issued the policy. It simply knew it was insuring an advance on account of freight paid on a contemplated voyage of the schooner "Wm. Nottingham." The first it knew of the instrument they sue on was after it had paid the cash and (tr. p. 19) when it read the receipt, in the peculiar form it was drawn, hoped it might get the money back and brought suit.

ARGUMENT.

I.

Libelant based their action on the instrument in writing given by the captain in Seattle on September 27, 1911. It clearly appears from the records and testimony in this case that the vessel was loading lumber at Westport, Oregon, and the captain went from there to Seattle, where he was under immediate control of Mr. Thorndyke, the manager of the Globe Navigation Company. As the libelant did not write their insurance based upon this written instrument and did not know of its existence until after the loss occurred, and as it appears from its face that it was executed at Seattle, the home port of the respondent, they were charged with notice that the captain had no authority to give such an instrument.

“***The ordinary rule was stated by Lord Abinger in the case of *Arthur v. Barton*, in the following terms, (1840) 6 M. & W. 138; 9 L. J. Ex. (N. S.) 187. ‘Under the general authority which the master of a ship has, he may make contracts, and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required. Therefore, if the owner or his personal agent be at the port, or so near to it as to be reasonably expected to interfere personally,

the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or his agent to do what is necessary.' "

Abbott on Law of Shipping, p. 173.

Thus it is well settled that where the owner is himself present or within easy access, that agency of the master which is founded on necessity disappears, for the necessity ceases to exist. No necessity can be sufficient if the owner be so near that the master is not obliged to act without instructions.

Botsford v. Plummer, 34 N. W. 572.

I Pars. Mar. Law, 380.

Jordan v. Young, 37 Me. 276.

Pentz v. Clarke, 41 Md. 327.

The Tribune, 3 Sum. 149.

The C. N. Titus, 7 Fed. 826.

"The principles regulating the authority of the master with regard to the employment of the ship, subject to some statutory alterations dealing with procedure, and with the limitation of the responsibility of shipowners, have not been in any way altered since Lord Tenterden wrote. This may be seen by comparing the foregoing with the judgment of the Court of Common Pleas in the case of *Grant v. Norway*, (1851) 20 L. J. C. P. 93, delivered by Lord Chief Justice Jarvis, who stated tersely the master's position as follows: 'The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and employment of the ship, but

is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary that which the owner has made.* * ' "

Abbott on Law of Shipping, p. 159.

Captains or agents, even at foreign ports, have no authority to vary a charter without express instructions from their principal.

Scrutton's Charter Parties and Bills of Lading, 5th Ed., 36.

The respondent denies liability upon this written instrument not only because the master had no authority to give it and it was therefore void, but also because there was no consideration whatsoever for the same, and we have heretofore pointed out that our contention is supported by ample testimony. The charter party was the basis for our right to demand the payment of this money. It was not a voluntary contribution on behalf of W. R. Grace & Co., but was a simple fulfillment of the terms of the written agreement under which the ship was chartered to them. They made themselves whole against any possible loss by reason of this advance to us by not only charging us interest on the money for the contemplated time the voyage would take, but also a commission for making the advance and a sum sufficient to pay the premium upon the policy of insurance which they had negotiated with libellant by procur-

ing the covering note in June, 1911. (tr. p. 44). Mr. Thorndyke, the manager of the Globe Navigation Company, testified (tr. p. 45) that he never saw one of these drafts until after the disaster to the "Wm. Nottingham" occurred, and a diligent search of the files of his office produced only one other similar draft; it is true Mr. Ford says that others were executed by captains of other schooners belonging to the Globe Navigation Company, but there is no proof that such drafts were ever returned to the home office, and, in view of Mr. Ford's testimony, it undoubtedly was their custom to take these drafts simply as receipts and file them away in the same way that an ordinary receipt is filed for money paid.

When the charter party was entered into the Globe Navigation Company, on its part, agreed to load on board the schooner "Wm. Nottingham", a certain amount of lumber and deliver the same as directed by charters at Callao or Valparaiso, and in consideration thereof, W. R. Grace & Co. agreed to pay the Globe Company a certain stipulated sum, a part thereof, on the right and full delivery of the cargo, and the remainder, not exceeding one-third of the full freight, for ship's ordinary disbursements at port of loading, when the schooner was ready to sail.

It is just as much a part of the consideration that

a part of the freight should be paid before the schooner sailed as that the remainder should be paid when the cargo was delivered. The mere fact that the money was worth insurance, commission and interest to us, does not alter the circumstances which induced us to make the charter party. That we paid the insurance, however, is very material, because it shows it was our insurance. What benefit would it be to us to have this insurance, if in case of loss, we had to return the money? If such were the case, would it not have been better for us not to have taken out any insurance and saved paying the premium? In view of this state of facts, is it reasonable to say that, for no reason at all, the captain could or intended to change the original agreement?

II.

We must look to the charter party executed between the respondent and W. R. Grace & Co. early in June, 1911, to determine what was in the minds of the parties to the charter party when they executed the same and also as to what risk the libelant was assuming when they issued the note covering the advance which W. R. Grace & Co. expected to make to the respondent prior to the sailing of the schooner

with her cargo on board. Taking into consideration the terms of the charter party, there is little or no difference between the English law and the American law concerning advances made on account of freight.

The English law appear to be as follows:

In *Allison v. Bristol Mar. Ins. Co.*, 1 App. Cas. 209, this rule of the English law was unanimously recognized in the House of Lords. Lord Penzance said, at page 244:

“But then, it is said, a payment of freight in advance cannot be recovered back if the goods do not arrive; and that this has been held for good law in successive cases. This, at least, shows that such an advance is not unfamiliar, either to the commercial community or the courts of law; and as to the injustice of it, the provisions of the present charter party show how easily and simply any injustice is practically avoided. An advance of freight is nothing more than an arrangement for the convenience of the shipowner who wants an advance, and, if the merchant will make it, is willing to pay the cost of insuring the advance when made, this practically taking upon himself in another form the risk, which properly belongs to him, of the freight never being earned at all.”

Hicks v. Shield, 26 L. J. Q. B. 205; 7 E. B. 633.

Allison v. Bristol Mar. Ins. Co., 1 App. Cas. 209-234.

Abbott on the Law of Shipping, pp. 666 and 640.

“The arrangement amounts to this, that the shipowner in consideration of the convenience of having the freight advanced, is willing to bear the cost of insuring that advance. That cost is therefore allowed, or returned, to the merchant out of the advance when he makes it. And the shipowner thus, in effect, bears the risk (represented by the cost of insurance) of the freight not being earned.”

J. Smith v. Pyman, 1 Q. B. 42.

Carver's Carriage by Sea (3rd Ed.), p. 642.

The rule as announced by the American courts is that money paid in advance on account of freight is to be returned if the voyage is not completed and the cargo delivered, unless there is a special agreement to the contrary. In the case at issue, there is such special agreement to the contrary imposed in the charter party itself, and each of the authorities cited by counsel for libellant specially make note of it.

The court in the *Burn Line* case, 162 Fed. 298, says:

“Indeed, they would have to re-pay to the charterer the first installment, but for the fact, which the charterer admits would be a defense, viz.. that they paid for its insurance.”

This authority, is specially in line because it ap-

pears by the uncontradicted testimony (tr. p. 44) that we paid insurance.

In the *DeSoto* case, 119 Fed. 373, the above principle is not questioned if supported by the proper proof.

And in the Massachusetts case, 9 Allen, 314, the court holds this rule (the only one contended for by libelant) may be varied or annulled by an express agreement in the charter party.

In *The Potomic*, 105 U. S. 630, there was no special agreement and the insurers were reimbursed, but only in the amount for which they had paid.

In *The Kimball*, 18 L. Ed. 50, the Court expressly says: "And there was no such special agreement in this case."

To the same effect are all the other authorities cited by libelant. It is the substance of the understanding, and not the form of words that they use, that creates the liability.

Raymond v. Tyson, 58 U. S. (17 How.), 53.

What difference does it make whether the Globe Navigation Company itself insures the advance on account of freight, which it had a right to do, or has W. R. Grace & Co. do so and has them charge the premium therefor to the Globe Co.?

III.

Appellant's third contention is that under its prayer for general relief it was entitled to recover notwithstanding that it did not prove the cause of action it alleged in its pleadings or proved that it was entitled to the express relief prayed for, but because it proved, it claims, another cause of action it could have had against respondents. The authorities cited by libelant do not, we believe, support its contention.

In the *Sonsmith* case, 21 Fed. 673, the relief granted was less than that prayed for but included therein. The libelant was mistaken only in the principles of law applicable to the loss which he alleged and proved, and the proof necessary to obtain the relief asked for and what the Court granted were the same, and the words quoted by counsel were used by the Court as applicable to that case only, and did not mean you could sue on one cause of action and prove another.

There is a wide difference between mistake in asking the proper relief and a total variance between the cause of action alleged and the proof.

In the *Panhallow* case, 3 Dall. 54, 1 L. Ed. 507, the report of which is very long, PATTERSON, J. says:

“The pleadings consist of a heap of mater-

ials thrown together in an irregular manner, and if examined by the strict rules of common law, cannot stand the test of legal criticism."

But concludes that from the "medley of procedure" it is possible to determine what was in controversy between the parties and to grant the proper relief.

In the *Prudence*, 204 Fed. 66, immediately preceding the quotation contained in libelant's brief, the Court says:

"The rules of pleading in admiralty do not require all the technical precision and accuracy which is necessary in the practice of common law. They do demand that the cause of action shall be plainly and explicitly set forth in clear and intelligible language, so that the adverse party may understand what is the precise charge which he is required to answer and make up issue directly upon that charge."

Consequently, whatever follows is governed by the above quotation, and clearly the Court did not intend that a libelant could plead one state of facts and recover upon another which was absolutely inconsistent from the one upon which he sued.

In the case of *Syracuse*, 12 Ball 167, there was only one cause of action alleged and proved. The only variance was between an antecedent fact growing out of the same cause of action and the recovery was not based upon any other cause of action than

that alleged. And the same is true as to the two other cases cited in support of the principles announced in the Syracuse case.

We do not believe that the cases cited by libelant announce the rule of law that there can be a total variance between the allegations and the proof, but we believe the true rule to be that when a suit is brought in an admiralty court, it must clearly state the grounds upon which a recovery is asked, so that the defendant may know what he is called upon to answer, and we think each of the cases so cited clearly announces the rule we contend for, and we will call your attention to the following additional authorities:

In *Barber v. Lockwood*, 134 Fed. 985, the Court says:

“The law is clear that defendants’ testimony must accord with the articles of the answer, just as the libelant’s testimony must follow the articles of the libelant. The parties make up the issue, and must stand by them until the end. *Mc Kinley et al. v. Morrish*, 21 How. 343, 16 L. Ed. 100.”

“A libelant cannot recover upon another ground than that upon which he has chosen to place his action in the pleadings.”

“But in the first place, to permit a libelant to recover upon this ground would be a departure from that upon which they had chosen to place their right of action in the pleadings.”

Rich v. Lambert, 12 How, 347; 13 L. Ed. 1017.

Here the variance is not merely immaterial but amounts to an absolute departure and total failure of proof.

IV.

Counsel for libelant seems to think that in our answer where we use the words "that one-third of the freight would be advanced and paid by charterers on account of the freight under said charter party" we have made some concession.

Arnould in his *Law of Marine Insurance*, 7th Ed., at Sec. 233, says:

"The charterer may insure advance freight—i. e., money advanced by him to the shipowner under their agreement as part payment of the freight—specifically, e. g., as 'advances on account of freight'; the reason being that several eminent judges have said that such a payment is not freight (which is not earned until the goods are delivered), but money paid for taking the goods on board and undertaking to carry them (q). Arnould, however, thought that the charterer could insure advanced freight *eo nomine* as freight, though it might be safer to insure it specifically; and his opinion is supported by high judicial authority (r)."

We quote again from Arnould, at the bottom of page 295, where he says:

“Lord Campbell, delivering the judgment of the Court, said: ‘There seems to be no reason why the money advanced may not be insured as freight, as well as the money to grow due on the charter, which is undoubtedly insurable as freight, although not properly freight, and rather the price of the hire of the ship. Nor do we see how we can be called upon to infer that the expression ‘money advanced on account of freight’ necessarily indicates that the insurance is effected by the shipper, and that the freight paid in advance is at his risk and not at the risk of the owner.’”

And again at Sec. 266.

“On the other hand, where the freight intended to be insured is the price of the hire of the ship under a charter party, the cases show that the inchoate rights to such freight vests in the shipowner directly the ship has broken ground on the voyage described in the charter party; from that moment nothing can intercept the earning of freight under the terms of the charter party, except the breaking up of the voyage by the perils insured against; and, consequently, from that moment the shipowner has an insurable interest in the freight, which but for the intervention of such perils he has thus put himself in a position to earn.

The shipowner has an insurable interest in the profit he expects to make by carrying his own goods in his own ship, and this interest he may protect by a general policy on the freight.”

Scruton on Charter Parties, at Art. 137, says:

“Where money is to be paid by the shipper to the shipowner before the delivery of goods for ship’s disbursements or otherwise, such pay-

ment will be treated as an advance of freight, or as a loan, according to the intention of the parties as expressed in the documents. The stipulation that it shall be paid 'subject to insurance' or 'less insurance' will indicate that payment is in advance of freight."

From what has already been said, the Court undoubtedly clearly understands respondent's position, that is, that the rights and liabilities of the parties to this action and of W. R. Grace & Co. are fixed and determined by the charter party entered into between this respondent and W. R. Grace & Co.

When the charter party provided that "A sufficient amount for ship's order disbursements at port of loading, say not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, *subject to a charge of 7 per cent to cover any insurance and commission advanced*, to be endorsed on the captain's copy of charter party and all bills of lading", there was an express agreement entered into that W. R. Grace & Co. should make this advance on account of freight and charge the cost of insuring the same to us. That being so, if a loss occurred W. R. Grace & Co. could not recover from us, but could recover from the insurance company, and the insurance company could not recover with both hands,—that is, they could not get the premium for

insuring the loss through W. R. Grace & Co. and, in case of loss, could not recover the very amount which we had insured and for which we have paid them a premium. This very question has been expressly passed upon by the Supreme Court of the United States as follows:

“****The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability.”

“But it is equally well settled that the right by way of subrogation of an insurer upon paying for a total loss of the goods insured to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss to recover over against the carrier. *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312 (29: 873); *St. Louis I. M. & S. R. Co. v. Commercial U. Ins. Co.*, 139 U. S. 223 (35:154).

“If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier.”

Wager v. Providence Ins. Co., 150 U. S. 100 (37 L. Ed. 1017).

Approved in *Willock v. Penn. R. Co.*, 166 Pa. St. 191; 30 Atl. 949.

“The question of the subrogation of the libelant to the rights of the shippers against the carrier presents no serious difficulty.***”

“In the present case, the libelant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier.***”

“The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills of lading, which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312 (29:873), that a stipulation in a bill of lading, that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier’s servants, to recover over against the carrier.”

Liverpool and G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397 (32 L. Ed. 799).

“In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless sub-

rogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer."

St. Louis I. M. & S. R. Co. v. Commercial Union Ins. Co., 139 U. S. 223 (35 L. Ed. 154).

"The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions."

Phoenix Ins. Co. v. Erie & West. Transp. Co., 117 U. S. 312, (29 L. Ed. 873).

This seems to be such well-settled law that we can find no late decisions in the Supreme Court of

the United States upon the subject. But the Circuit Court of Appeals in the First Circuit, in the case of *M. & M. Transportation Co. v. Robinson-Baxter-Dissosway T. & T. Co.*, 191 Fed., at p. 773, decided November 29, 1911, says:

“The only point decided there was that, where a bill of lading provided that the carrier should have the benefit of any insurance, this excludes the right of the insurer to subrogation against the carrier, and also that, when the carrier is actually the party insured, the underwriters have no right to recover against him. These are well-settled principles of law, although facts like those which occurred in that case have raised some confusion as to the question whether or not the underwriters are liable to the carrier where the bill of lading contains provisions such as we have stated. We regard it, however, as now settled that, unless the underwriter reserves in its policy a positive right as against such a provision, the underwriter can claim to be subrogated to only such rights as the owner of the cargo or carrier may have, and his right to subrogation is limited accordingly.”

Counsel for appellant objects to the reasoning by which the Trial Court arrived at its conclusions; but be that as it may, it is immaterial if the Trial Court's judgment was correct. The Supreme Court of the State of Washington has said:

“The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether

considering all the evidence its decision was the proper one to be entered."

Kane v. Dawson, 52 Uash. 413.

In the printed opinion of the Trial Court there also occurs this statement:

"Under the law controlling in this case the insured could have maintained an action against the respondent to recover the advance made. *St. Louis etc. Ry. v. Commer. Ins. Co.*, 139 U. S. 233."

Upon examining the *St. Louis* case, we find JUDGE GRAY says.

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action none passes to the insurer."

the United States upon the subject. But the Circuit Court of Appeals in the First Circuit, in the case of *M. & M. Transportation Co. v. Robinson-Baxter-Dissosway T. & T. Co.*, 191 Fed., at p. 773, decided November 29, 1911, says:

“The only point decided there was that, where a bill of lading provided that the carrier should have the benefit of any insurance, this excludes the right of the insurer to subrogation against the carrier, and also that, when the carrier is actually the party insured, the underwriters have no right to recover against him. These are well-settled principles of law, although facts like those which occurred in that case have raised some confusion as to the question whether or not the underwriters are liable to the carrier where the bill of lading contains provisions such as we have stated. We regard it, however, as now settled that, unless the underwriter reserves in its policy a positive right as against such a provision, the underwriter can claim to be subrogated to only such rights as the owner of the cargo or carrier may have, and his right to subrogation is limited accordingly.”

Counsel for appellant objects to the reasoning by which the Trial Court arrived at its conclusions; but be that as it may, it is immaterial if the Trial Court's judgment was correct. The Supreme Court of the State of Washington has said:

“The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether

considering all the evidence its decision was the proper one to be entered."

Kane v. Dawson, 52 Uash. 413.

In the printed opinion of the Trial Court there also occurs this statement:

"Under the law controlling in this case the insured could have maintained an action against the respondent to recover the advance made. *St. Louis etc. Ry. v. Commer. Ins. Co.*, 139 U. S. 233."

Upon examining the *St. Louis* case, we find JUDGE GRAY says.

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured; in a court of equity or of admiralty, or under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action none passes to the insurer."

We conclude, therefore, there must be some misprint in the learned Trial Judge's opinion.

We respectfully ask that the decree of the Trial Court be affirmed and that we also recover our costs in this court.

CLISE & POE,
Proctors for Respondent.

Dated: Seattle, Washington,
October 11th, 1915.

No. 2630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY

(a corporation),

Appellant,

vs.

GLOBE NAVIGATION COMPANY (a corporation) and S. P. WESTON, as trustee in bankruptcy of the GLOBE NAVIGATION COMPANY (a corporation), bankrupt,

Appellees.

REPLY BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant.

Filed this.....day of December, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

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Appellees.

REPLY BRIEF FOR APPELLANT.

Appellant and appellees are agreed that before the "Nottingham" set sail her captain received from her charterer a certain sum of money. They agree also, presumably, that the payment thereof represented either an advance of cash by way of a loan, evidenced by the captain's draft, or an advance or prepayment of freight under the charter party.

The voyage was frustrated and the "Nottingham" never delivered her cargo.

The court below held that we mistook our remedy in suing upon the captain's draft, and, on that ground, decided the case adversely to us, stating, however, in substance, that the decree would have been in our favor had we asked expressly for the recovery of prepaid freight. Appellees also contend that we predicated our libel upon the wrong theory but (in disagreement with the court) deny our right, even had we sued expressly therefor, to the return of prepaid freight.

Reserving for later discussion our claim upon the captain's draft, this brief is first addressed to the question of our right to recovery of prepaid freight, assuming, for present purposes, that our libel had been focused directly upon that contention.

I.

THE RIGHT OF APPELLANT TO RECOVER AS FOR PREPAID FREIGHT, PROVIDED THE LIBEL BE DULY PREDICATED UPON THAT THEORY.

On this point, appellees and the lower court are, as heretofore intimated, in disagreement: the court holding that we would, and appellees that we would not, be entitled to such recovery. We submit, of course, that the correct conclusion is that of the court.

To begin with, we frankly admit that appellant (the insurer of the advance) is entitled to recover as for prepaid freight only if the assured, itself, that is to say, the charterer of the ship, could have recovered therefor. We do not for a moment dispute the well-

settled rule that the insurer can take nothing by subrogation but the rights of the assured, and that if the assured has no right of action, none passes to the insurer. Appellees on pages 20 to 25 of their brief are simply tilting a wind mill with their elaborate array of authorities on this point. The trial judge has no need of their conclusion that there must be some misprint in his opinion with reference to the case of *St. Louis Railroad v. Conner Insurance Co.*, 139 U. S. 223, for the actual words of the trial judge's opinion are:

“Under the law controlling in this case, *the insured* could have maintained an action against the respondent to recover the advance made.”
(Italics ours.)

In other words, the conclusion of the judge that libelant might have recovered for prepaid freight is upon the assumption that the assured could have so recovered.

Was the trial judge right in his view that the charterer might have recovered prepaid freight? Appellees' contrary contention is embodied in Division II of their brief. Seemingly fearful of a frank reliance on the settled American doctrine they revert again to the English law which, as we were at pains to point out in our opening brief (p. 12) and as the trial judge in his opinion said does not obtain in the United States.

“The general doctrine of the English cases, although they do not seem to be wholly consistent or founded on any clear and uniform principle, appears to be that a payment of freight in advance cannot be recovered back, unless it is made to appear affirmatively that it was intended by the

parties merely as a loan. *But as we do not regard these decisions as correct in principle we must treat them as indicating a local peculiarity of English law, which is not to be extended beyond the jurisdiction in which it is shown to have been adopted.*" (Italics ours.)

Chase v. Alliance Insurance Company, 91 Mass. (IX Allen) 311 at 315.

The unquestioned American rule is that, as freight is not earned where the contract of transportation is not performed by the carrier, freight paid in advance may be recovered back upon the frustration of the voyage and non-delivery of the cargo, unless the cause thereof be some fault of the shipper or unless there be express written stipulation between the parties to the contrary. To the citations given in our opening brief (p. 12) we venture now to add the following:

6 Cyc., 494;

Mitsui v. St. Paul Fire & Marine Ins. Co., (9th Circuit) 202 Fed. 26 at 29;

The Norman Prince, 185 Fed. 169 at p. 171;

Phelps v. Williamson, 5 Sand. (N. Y.) 578;

Griggs v. Austin, 20 Mass. (3 Pick.) 19;

The Tornado, 108 U. S. 342; 27 L. Ed. 747;

Watson v. Duykinck, 3 Johns. (N. Y.) 337.

Appellees rely upon what we have just conceded to be a recognized qualification of the general rule, to wit, that the owner may be relieved of his otherwise binding obligation to return prepaid freight if there be in the charter-party or bill of lading a special agreement permitting him to retain the same.

Appellees fail to note, however, that the agreement to vary the general rule shall be, not only in writing, but shall be also in clear, explicit and unmistakable terms. Thus, in the case of

Chase v. Alliance Ins. Co., 91 Mass. (IX Allen)
311,

referred to on page 13 of appellees' brief, the court quotes with approval from the earlier case of

Benner v. Equitable Ins. Co., 88 Mass. (VI Allen)
222,

wherein Chief Justice Bigelow said at page 224:

"The general rule of law is, that freight paid in advance is not earned, unless the voyage for which it is stipulated to be paid is fully performed, and the owner of the vessel is liable to a claim for reimbursement in favor of the shipper, if for any fault not imputable to the latter the contract of affreightment is not fulfilled. *Minturn v. Warren Ins. Co.*, 2 Allen 86, and cases cited. This rule may be varied or annulled by an express agreement in the charter-party or bill of lading, by which it is provided that money paid in advance on account of the freight shall be deemed to be absolutely due to the owner at the time of its prepayment, and not in any degree dependent on the contingency of the performance of the contemplated voyage and the entire fulfilment of the contract of carriage. *But as such a stipulation is intended to control the usual rule of law applicable to such contracts, and to substitute in its place a positive agreement of the parties, it is necessary to express it in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise the general rule of law must prevail.*" (Italics ours.)

In the case of

Brittan v. Barnaby, 21 How. 527; 16 L. Ed. 177, the United States Supreme Court, in declining to recognize a stamp or memorandum upon a bill of lading designed to make freight payable prior to delivery, and in enforcing rigidly the general rule that freight money is not due until the cargo be actually delivered, said (L. Ed. p. 180):

“Such a stamp cannot be considered a stipulation, according to the legal meaning of that word. All writers upon commercial law use the word stipulation to denote a particular engagement, which may be insisted upon, before it can control the general operation of law, or vary a contract. Such stipulations are not uncommon between ship owners and shippers of merchandise, in charter-parties and in bills of lading. But when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail; and the stipulation must be in writing, and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed. A memorandum or stamp upon the back of a bill of lading is insufficient for such a purpose, though the ship owner may have made it as an intimation of his mode of doing business, or that a practice prevailed in conformity with it at the port to which the goods were to be carried and delivered to a consignee.”

No showing of a custom contrary to the general rule will suffice to abrogate the latter.

Emery v. Dunbar, 1 Daly (N. Y.) 408.

“It is a well settled rule of law that if freight is paid in advance, and in consequence of the capture or shipwreck of the vessel, or other cause beyond

the control of the master or owners, the goods are not carried to the place of destination, the freight is not earned, and may be recovered back, unless a special agreement was made to the contrary. * * *

Where a general rule or principle of law like this has been long and well established, it cannot be controlled by proof of any usage to the contrary." (Italics ours.)

The "special agreement to the contrary" relied upon in modification of the general rule must, then, be a clear and unambiguous stipulation in writing. Shipping men know perfectly well the stipulation which is currently used for this purpose. It appears, for instance, in standard form in the case of

Portland Flouring Mills Co. v. British & F. M. Ins. Co., 130 Fed. 860,

at page 863 as follows:

"The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit."

Another example of such a clear and unmistakable stipulation appears in the case of

The Queensmore, 53 Fed. 1022,

at page 1023, as follows:

"The freight is payable upon said cattle at the rate of eighty shillings British sterling per head on the number shipped at Baltimore, whether delivered alive or not delivered at all, and is payable in Liverpool on the arrival of the steamships."

The foregoing are stipulations of the kind required by the law as laid down by Chief Justice Bigelow in the classic case of *Benner v. Equitable Ins. Co.*, supra;

they are "so clear and unambiguous as to leave no doubt" that there is a positive agreement of the parties to vary the normally prevailing rule.

Now, what have the appellees to offer as an agreement or stipulation to set aside the rule which unquestionably otherwise governs as between the charterer and the shipowner in this case, and requires the Globe Navigation Company, having failed in delivery of the cargo, to return the prepaid freight to the charterer? Nothing clear and unambiguous! They proffer simply this: that the charter party contains the following provision:

"A sufficient amount for ship's ordinary disbursements at the port of loading, same not exceeding one-third of the freight, to be advanced by charterers, if required by captain, on account of freight under this charter party, subject to a charge of seven per cent to cover interest, insurance and commission; advance to be endorsed on captain's copy of charter party and all bills of lading."

The foregoing provision appellees endeavor to strain into an express stipulation that the prepaid freight should be retained absolutely by the shipowner. The fact that we paid the insurance, say appellees, and that we paid interest and commission for the advance show that the insurance was to be for our benefit; in other words, that we were to retain the freight money whether the cargo should or should not be delivered. "What benefit would it be to us to have this insurance, if in case of loss, we had to return the money? If such were the case, would it not have been better for us not to have taken out any insurance and saved paying the premium?" (appellees' brief p. 10). The answer to

these questions is plain: Unless the ship owner had been willing to pay the premium to insure the advance, it would have received no advance. To put the situation in other words, the Globe Navigation Company chartered its vessel, the "Nottingham," to W. R. Grace and Co. The ship owner found that it would be a convenience to receive one-third of the freight money in advance. The charterer consented to pay the same, provided the owner would insure the advance and pay interest and a commission thereon. The premium, interest and commission were the considerations upon which the charterer was willing to pay in advance what otherwise would not be due until the ship reached Callao, Peru. To read into a plain provision of this sort a stipulation that the freight moneys should be retained, earned or unearned, is plain violence to plain language. Where is the express unambiguous agreement of the parties which the courts have prescribed as requisite to change the otherwise fixed rule of American law that prepaid freight shall be returned if the cargo be not delivered?

Appellees urge that the trial court in finding, as it did, that "there is no testimony before the court upon which to predicate a finding that the insurance was obtained for the respondent," must, by inadvertence, have overlooked the testimony of Mr. Ford (Ap. 29) to the effect that in placing this insurance W. R. Grace and Co. were acting for the ship owner. To this, it is to be said, first of all, that the insurance policy distinctly reads and runs in favor of W. R. Grace and Co. Had it been intended that the insurance should be

for the benefit of the Globe Navigation Company, it would have been perfectly possible to make the policy read accordingly. In the second place it is not surprising that the court should consider Mr. Ford's testimony incompetent, for it appears that at the time of the placing of the insurance he was on his way home from South America and had nothing to do personally with the transaction and had no personal knowledge thereof (Ap. 38, 42).

To summarize: The established American rule that freight prepaid shall be returned in the event that the cargo be not delivered can be varied only by stipulation between the parties to the contrary. Such stipulation must not only be in writing, but must be express, clear and unambiguous; no such stipulation appears in the charter-party entered into between the ship-owner and charterer in this case; the effort of the owner to distort into such a stipulation the agreement of the charterer to make an advance provided the owner should pay insurance, commission and interest thereon is obviously futile; failing such express, clear and unambiguous stipulation, the freight prepaid by the charterer to the owner could have been recovered by the former upon the abandonment of the voyage; to that right of recovery, the insurer, appellant herein, succeeded, under the doctrine of subrogation, upon payment of the insurance.

To these conclusions, the trial court apparently subscribed, but declined to decree in our favor because the learned judge felt that we had brought our libel upon

the wrong theory in grounding it primarily upon the assignment to the insurer of the captain's draft.

This opinion of the trial court and the contention of appellees in Division III of their brief, that we are not entitled in this case to recover as for prepaid freight under the prayer of our libel for general relief, we firmly believe to be founded upon an unfortunate misapprehension of the spirit and intent of the admiralty pleading and practice. We now come, therefore, in the course of the regular and orderly development of the discussion, to our next point which is that

II.

IF, AS WE BELIEVE THE PRECEDING DIVISION OF THE ARGUMENT ESTABLISHES, APPELLANT HAS A CASE FOR THE RECOVERY OF PREPAID FREIGHT, IT IS IN ADMIRALTY ENTITLED TO THAT RECOVERY UNDER THE RECORD NOW BEFORE THE COURT.

We do not propose to infringe upon the patience of the court by reviewing again the cases set out in Division III of our opening brief and by reiterating the principles laid down in those cases. Suffice it to say here, simply, that it is the undeniable rule of admiralty practice and pleading that the controlling motive and desire of admiralty courts shall be to see that justice is administered as between parties litigant, by extracting the real case from the whole record; and such courts

consistently decline to allow that a party having a clear cause of action shall be deprived of its rights through failure or omission to frame and present its case with exacting precision in the opening pleadings. This does not mean that admiralty courts will permit a libelant to present its case with gross carelessness or in bad faith and with design to take advantage of a respondent, nor even that a party framing its case mistakenly, though in good faith, shall be allowed to recover if its mistake operate to surprise the other party. Where however the pleadings and evidence adduced, though they do not precisely correspond, nevertheless present, when the record is viewed as a whole, a clear case for the libelant, and the court sees that justice requires a decree in its favor, and such decree can be given without prejudice to the respondent, the admiralty courts decline to be turned aside by suggestions of variance between pleading and proof.

In this case appellant, in entire good faith, framed its libel primarily upon the theory that it was entitled to recover the advance that was made to appellees by a suit founded upon the captain's draft. We still believe, as we contended in Division I of our opening brief, that our position in this regard was well founded, but we urge that if our proper redress were by suit for the recovery of prepaid freight we are in the present state of the record, since our libel and respondent's answer and the evidence present the whole situation clearly to the court, entitled to a favorable decree.

Our libel itself sets before the court, in Paragraph II thereof, that the money given to the captain was an advance against freight. True, the libel does not set out that paragraph of the charter-party which provides that such advance should be made. This omission, however, is duly supplied in Paragraph VII of respondent's answer. There is therefore no room for any contention upon the part of appellees that an award to us upon the prepaid-freight theory would be in anywise a surprise to them. This situation brings us clearly within the suggestion of

The Clement, 5 Fed. Cas. 1015,

that "the court will look at the allegations of both the parties", and of

The Syracuse, 12 Wall. 67; 20 L. Ed. 382,

that when the proof comes from the opposite party it cannot be deemed to have operated to surprise him.

The amazing contention of appellees in this case is that, even though the record show a case in our favor built in part by their own pleading and proof, we should be denied the decree because our initial pleading did not present completely the grounds therefor. How is such a position to be reconciled with the broad statement of

The Prudence, 204 Fed. 66,

that,

"The court below, having the whole matter before it, was bound to decree in accordance with the facts established"?

(The cases to which we have just referred, together with others holding like doctrine, are considered more fully in our opening brief pp. 13 to 19).

We do not wish, by our emphasis on what we believe to be our undeniable right to recover as for prepaid freight, to suggest or convey the impression that we abandon our initial contention for a recovery in this case as legal owner and holder by due endorsement and assignment of the captain's draft. We therefore devote the concluding pages of this argument to rebuttal of Division I of appellees' brief and to our affirmative contention that

III.

APPELLANT IS ENTITLED TO RECOVER UPON THE CAPTAIN'S DRAFT.

It is admitted that appellant is the legal owner and holder of the draft by due and legal endorsement and assignment. Appellees contend, however, that we are not entitled to recover thereon because the master, being at his home port, was without authority to execute the draft. We concede, as indeed we did in our opening brief, that a ship master cannot normally pledge his owners at the home port of the vessel. Appellees' excerpt from Abbott on the Law of Shipping (page 7 of their brief) very explicitly states, however, that this normally prevailing rule gives way if

there be special authorization to the captain or some usual custom of trade sanctioning a contrary practice.

The facts developed in the taking of testimony upon this cause suggest irresistibly an implied, if not an express, authorization to the master of the "Nottingham" to execute drafts of the character here in controversy. That testimony shows, also, that, at least so far as W. R. Grace and Co. and the Globe Navigation Company are concerned, the giving and taking of these drafts was a usual custom of trade. Thus, to amplify somewhat the statements of our opening brief in this connection, Mr. Ford of W. R. Grace and Co. testified (Ap. 33) that his company took a great number of drafts of this same character from the Globe Navigation Company at previous times. He further testified (Ap. 34):

"Mr. CAMPBELL. Q. You have personal knowledge of the fact of taking other drafts of the master of his vessel?

A. I have, yes.

Q. You say that this is the kind of a draft that you always used?

A. That is our usual form of draft. I made our first transaction with the Globe Navigation Company and established the routine by which this business was done.

Q. Did you ever make advances without taking drafts?

A. No, sir."

And, again later, Mr. Ford testified (Ap. 40-41):

"Q. Now, in all the drafts that W. R. Grace & Company took from the Globe Navigation Com-

pany for advances under prior charters, they were the same character as this draft, I understand?

A. The same, yes."

Mr. Thorndyke, the manager of the Globe Navigation Company, professed complete innocence of any knowledge of these constantly used drafts, until one was shown him taken from the very files of his own office—the so-called Clise draft (Ap. 45, 61). One is tempted to suggest, with all respect, that Mr. Thorndyke must be of the school of those who hold that where ignorance is bliss, 'tis folly to be wise. Captain Swenson of the "Nottingham" corroborates Mr. Ford's testimony that these drafts were in constant use (Ap. 59-60):

"Q. Now, you have secured advances on other voyages, haven't you?

A. I have.

Q. You have signed documents for them, haven't you?

A. I have.

Q. While you were in the employ of the Globe Navigation Company?

A. While I was in the employ of the Globe Navigation Company.

Q. As master of the schooner 'William Nottingham'?

A. Yes, sir."

And Mr. Thorndyke, himself, on redirect examination by his own counsel stated that the masters of the Globe Navigation Company's vessels returned files of documents to the head office which he understood contained all the papers connected with the various shipments (Ap. 48):

“Mr. CLISE. Q. Didn't the masters customarily return to you whatever papers they took or gave to Grace & Company, or copies of them?

A. They always returned a file of documents which I assumed contained all of the things, all the documents in connection with that transaction with Grace & Company's office.

Q. Either the documents, duplicates or copies, as I understand?

A. Yes, sir, copies.”

The drafts were executed in triplicate, and the captains of the ships, therefore, had two copies left after delivery of the original to W. R. Grace and Co.

Mr. Thorndyke further admitted, with reference to the “Clise” and the “Nottingham” drafts that even after they came to his notice he never asked W. R. Grace and Co. for their return, thus recognizing by his inaction in that behalf their continuing validity (Ap. 63).

Appellees in their brief (pages 2 to 5) repeatedly assert or suggest that this draft was nothing more nor less than a receipt for the money advanced. If so, it was the most labored and cumbersome form of receipt ever devised. The use of an elaborate draft of this character simply for a receipt would be absurd beyond belief. The plain fact is that there were separate and ordinary receipts for this money and they are in evidence: that signed by the master as Plaintiff's Exhibit B (Ap. 55) and a duplicate receipt signed by the Globe Navigation Company, Limited, G. C. Thomas, as Libellant's Exhibit 4 (Ap. 21) and as Plaintiff's Exhibit D (Ap. 60).

We respectfully repeat the request of our opening brief, that the decree entered in the court below be reversed and that said court be directed to enter a decree for libellant (appellant here) in accordance with the prayer of the libel, and that appellant be accorded its costs and such other and further relief as may be appropriate in the premises.

Dated, San Francisco,

December 15, 1915.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant.



